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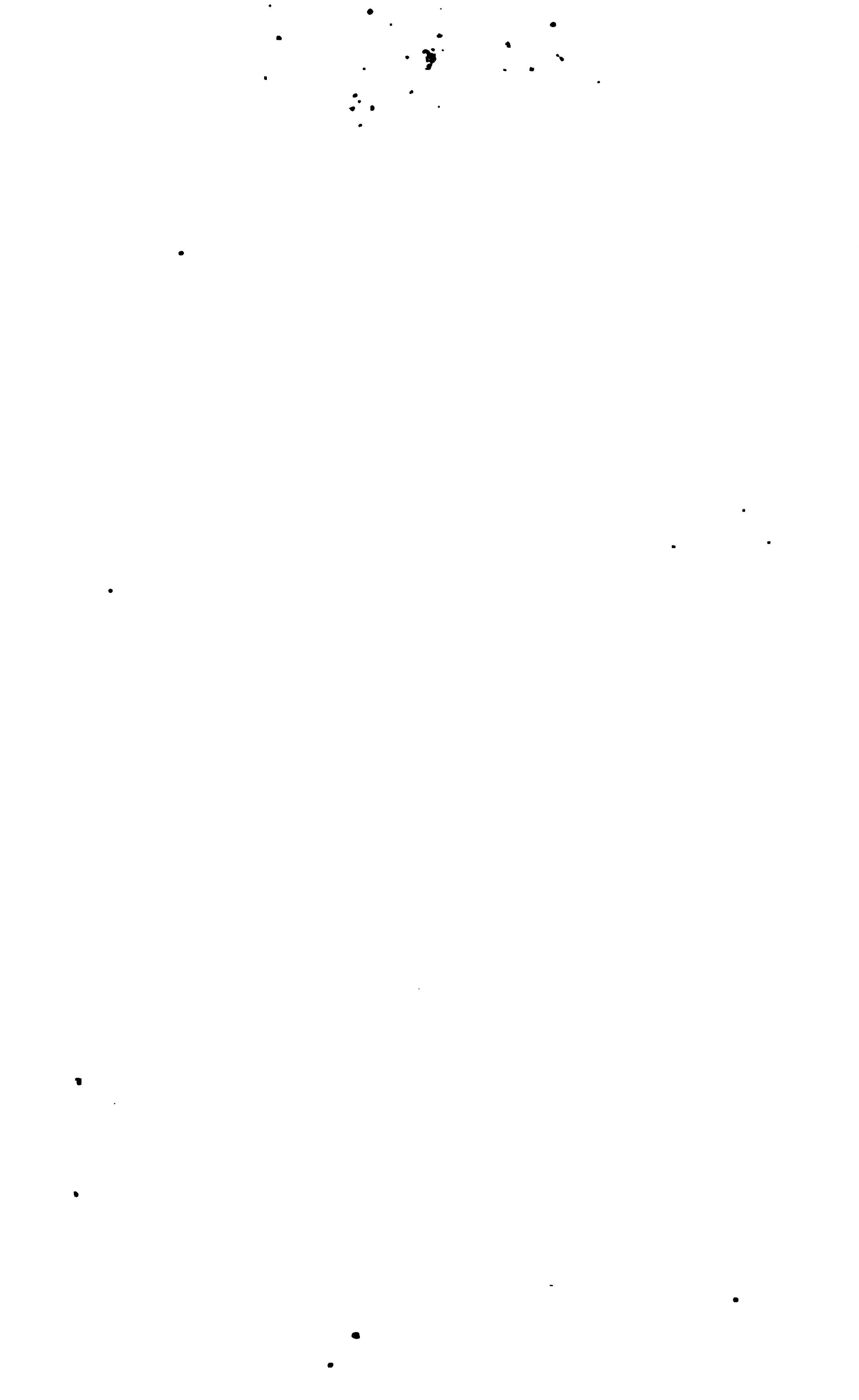
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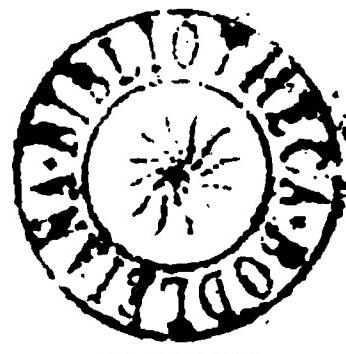


THE
Authorized
REPORTS
OF
CASES IN CHANCERY,
ARGUED AND DETERMINED
IN
THE ROLLS COURT
DURING THE TIME OF
THE RIGHT HONORABLE
SIR JOHN ROMILLY, KNIGHT,
MASTER OF THE ROLLS.

BY
CHARLES BEAVAN, ESQ., M.A.,
BARRISTER AT LAW.

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A

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R T S

C.F.

CASES

SUED AND DETERMINED

IN

THE ROLLS COURT.

LAVER v. FIELDER

1862.
Dec. 18.

THE object of this suit was to enforce a written promise, made by a father on the marriage of his daughter, under the following circumstances :—

In 1844, the testator Mr. *Fielder* had two children, viz. *Elizabeth*, a daughter by his first marriage, and *John Henry*, who was then only four years of age.

In December, 1844, *Henry Laver* made proposals of marriage to *Elizabeth Fielder*, and he wrote to her father, stating the particulars of his property, and asking him to make a suitable settlement. Negotiations afterwards took place between them and their solicitors as

Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, viz., to allow *Elizabeth* 100/- a-year, . . .

and at my decease she shall be entitled to her share of whatever property I may die possessed of."

to *Held*, 1st. That this was a con-

tract binding on the father; 2nd. That it was not so vague as to prevent its being enforced; 3rd. That it did not include freehold property; 4th. That the daughter was entitled to an equal share with the other children of the personal estate which the testator died possessed of, after deducting the widow's one-third share and the debts and expenses; 5th. That parol evidence was inadmissible to shew what was intended by the words "her share"; 6th. That the suit ought not to be by the daughter alone, but that her husband ought to be a Plaintiff.

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 v.
 FIELDER.

to the money arrangements to be made, but, in consequence of disagreements, Mr. *Fielder* wrote an angry letter, and all further negotiations for the marriage were thereupon broken off.

Some time afterwards the treaty for the marriage was renewed, and Mr. *Laver* sent, through *Elizabeth Fielder*, a letter to her father, asking his consent to the marriage. Mr. *Fielder* thereupon wrote to Mr. *Laver* the following letter :—

“ 1st April, 1845.

“ Dear Sir,—My daughter has given me a letter from you, in which you say you are willing to marry her, if I will give my consent. I certainly, in my last to you, did state that which was my feeling upon the subject then, for I could not conceive that any man who had a regard, such as you had professed for her, could have so suddenly altered his determination, as you had done twice. I therefore concluded, and I think very naturally, that your only motive was to see how much money I thought proper to give her, and as I had no particular wish to see her married to any man that I had the least idea would not make her a good husband, was the cause of my writing as I did. However, as you have now a wish to renew the acquaintance, so far as I am concerned, I will still adhere to my last proposition, viz. to allow *Elizabeth* 100*l.* per annum, and if you like the situation, one of my houses to reside in, *and that at my decease she shall be entitled to her share in whatever property I may die possessed of.* As to all other matters, I shall leave it entirely to you and her, she being now as I consider of sufficient age to judge for herself. I shall be most happy to see you and to be on as friendly terms as we ever were, and which I sincerely hope no further misunderstanding will sever.”

The

The marriage took place in *July*, 1845, with the full consent of Mr. *Fielder*, but no settlement was ever executed.

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The testator died in 1859, leaving his son, his daughter and his widow surviving. By his will and codicil, dated respectively in 1847 and 1854, he had made an equal disposition of his real and personal estate in favour of his widow, son and daughter, and provision for his grandchildren. In the event of his son's dying under twenty-one, his share was given over to his sister.

In *November*, 1859, Mrs. *Fielder*, the executrix, instituted a suit against Mr. and Mrs. *Laver* for the administration of the testator's estate, and a decree was made in *February*, 1860, but no certificate had yet been made.

The testator's son, *John Henry Fielder* attained twenty-one in *October*, 1861.

Mr. and Mrs. *Laver* alleged, that they had learned for the first time in *April*, 1862, that the letter of the testator of the 1st of *April*, 1845, amounted to a binding contract.

The bill was filed in *May*, 1862, by Mrs. *Laver* by her next friend, against Mrs. *Fielder*, *John Henry Fielder* and Mr. *Laver*. It prayed a declaration, that Mr. *Fielder* "was bound so to leave or dispose of his property, that the Plaintiff should, after his death, have a share of all his property, both real and personal, equal with what he should leave to his son and any other children or child that he might have; and that all necessary directions might be given for setting

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—~
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apart for the Plaintiff such share of the said testator's residuary real and personal estate."

Mr. Selwyn and **Mr. Piggott**, for the Plaintiff, and **Mr. Davey**, for the husband. The letter constitutes a valid contract, binding on **Mr. Fielder** and his estate. That has been established by a series of modern authorities.

Loxley v. Heath (a); *Bold v. Hutchinson* (b); *De Beil v. Thomson* (c); *Hutton v. Rossiter* (d); *Barkworth v. Young* (e); *Golding v. Townsend* (f).

Secondly, as to the construction of the words "at my decease she shall be entitled to her share in whatever property I may die possessed of." This means an equal share of his property. [The MASTER of the ROLLS:—It cannot mean that the widow was to be left destitute.] It is a contract that no preference should be made as between his children, in regard to whatever property he died possessed of; but that each should be entitled equally. The word "property" includes the freehold estates of the testator, which produced 180*l.* a year.

They proposed to give in evidence a conversation between Mr. Laver and Mr. Fielder in 1848, in which the former asked the latter if he had made his will, and in answer to which inquiry Mr. Fielder expressed himself as follows:—"My property, as I have before told you, will be divided, one-third to go to my wife, one-third to my daughter, and one-third to my son, and at the death of

my

- | | |
|---|------------------------------------|
| (a) 27 <i>Beav.</i> 523, and 1 <i>De G., F. & J.</i> 489. | & <i>Fin.</i> 45. |
| (b) 20 <i>Beav.</i> 250, and 5 <i>De G., M. & G.</i> 558. | (d) 7 <i>De G., M. & G.</i> 9. |
| (c) 3 <i>Beav.</i> 469, and 12 <i>Clark</i> | (e) 4 <i>Drew.</i> 1. |
| | (f) 28 <i>Beav.</i> 445. |

my wife, her one-third will be divided between my daughter and son."

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This evidence was objected to as inadmissible, the object of it being to control the written instrument.

Mr. *Southgate* and Mr. *F. H. Colt*, for the Defendants. This suit is improperly framed, being one by the wife alone to enforce a contract between the testator and her husband. The husband ought to be joined as co-Plaintiff, and the bill amended for that purpose. Parol evidence is inadmissible in this case; the Plaintiff must stand or fall upon the written document, and nothing which took place afterwards could affect its construction.

The letter of 1845 is too vague and uncertain in its terms to be capable of being enforced; *Kay v. Crook* (a). It is a mere general vague notice of his intentions. What is "her share"? She was entitled, as of right, to none. Again, there are no words of equality, nor any statement of the class with whom she is to share. In all the decided cases the class has been ascertained, as "shall share with my other children." The word "property" is ambiguous, and the expression "possessed" shews that it did not extend to freeholds. If it included real estate, then, as the daughter takes no share in real estate, the difficulty would be increased as to the words "her share."

There was no contract to die intestate, and the testator had a clear right to deal with his property as he pleased during his life, and it was not intended that he should be deprived of all power of disposition by his will.

(a) 3 *Smale & Gif.* 407.

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will. This is a case within the mischief intended to be prevented by the Statute of Frauds. (29 Car. 2, c. 3, s. 4.)

Lastly, the Plaintiff is bound by her laches and acquiescence. She has taken the chance of her brother dying under twenty-one, and, until that event happened, elected to abide by the will. With that view, she submitted to a decree for the administration of the testator's estate, and to carry the will into execution.

Mr. Piggott in reply.

The MASTER of the ROLLS.

I am of opinion in this case that the Plaintiff is entitled to a decree.

I think it is impossible for me to allow the parol evidence to vary the effect of the letter. The testator, in his letter, after a few preliminary observations, says, "I will still adhere to my last proposition." If that stood alone, parol evidence might properly have been given to explain what that "last proposition" meant. But the testator has himself gone on to explain what he intended by his "last proposition,"—for he puts a *videlicet* after it, and says, "viz., to allow *Elizabeth* 100*l.* *per annum*, and, if you like the situation, one of my houses to reside in; and that at my decease she shall be entitled to her share in whatever property I may die possessed of." I am of opinion that I cannot allow parol evidence to be introduced for the purpose of varying those words. The testator expressly states what he intends, in words which it is necessary for me to construe. If I agreed with the argument, that the words are too ambiguous to admit of any definite or distinct meaning, I should make no decree at all. But

if

if not, those are the words upon which I am to decide. In my opinion that excludes the parol evidence; because, assuming it to be true and that this evidence shews that his "last proposition" was different, still when the testator in his letter states what his "last proposition" is, his contract is confined to that statement, and cannot be carried beyond it.

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The next point which I have to consider is the construction of the words used. What do they mean? The words are these:—"At my decease she shall be entitled to her share in whatever property I may die possessed of." The first question is, whether those words are too ambiguous or too vague for the Court to put any definite and distinct meaning upon them? I was referred to the case of *Kay v. Crook* (a), which was that of a father having promised to recognize his son in his will; and the Court there held that that promise was much too vague to entitle the son to anything. I concur in that view of the case. "Recognizing" the son evidently amounted to nothing more than a mere statement that he was his son. If the rule of the civil law prevailed, that a man could not disinherit his son without shewing that he had him present to his mind at the time, and from whence arose the practice of leaving the son a shilling, or, as it is commonly said, "cutting him off with a shilling," it is clear that that is a recognition of the son in the will; yet such could not be the meaning of the farther in this case, and beyond that no line could be drawn.

I do not mean to say what would have been the effect, if the words here used had been "entitled to a share of the property." The words used are, "entitled to her share

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share of the property." But what is a daughter's share of property? Suppose a person were asked this question:—What is the share your children have in your property? The answer which would suggest itself to my mind, as a lawyer, would be, "the share which by law they have in your property." But what, then, is her share in your property? Her share in your property is an equal share with her brothers and sisters in two-thirds of the personal estate. The share of the widow is one-third, and the daughter's share is an equal share with all her brothers and sisters in the two-thirds which remain. What, then, is it that the testator here meant to give his daughter? Here was a gentleman about to marry that daughter, who said to the testator, "What will you give her?" He replies, "She shall have her share in my property." The gentleman goes to his lawyer, and asks him what is a daughter's share in the property; upon which he is told it is an equal share with her brothers and sisters in two-thirds of the father's personal estate. A promise is to be taken most strongly against the person who promises, for the same reason as a grant is against the grantor. The testator might naturally have expected that he would have more children than he then had; and I think that the words of the promise leave open the consideration for other children to be born, in order that they might also have their shares. This daughter, then, would only have taken whatever was her proportion of the two-thirds, which furnishes a distinct and definite meaning to the words.

It was, however, justly observed, that the words are—"her share in *whatever property*," which would include real estate; and therefore it was suggested, on the one hand, that the Plaintiff or the Plaintiff's wife, would take one-third of the real estate; and on the other, that if

if the real estate were intended and she took no share in it at all, it made the whole void for uncertainty. But I do not think it is necessary to adopt that view. I think a difficulty might have arisen if there had been nothing but real estate; because then the daughter would, by law, have had no share at all; and yet, as it would have been necessary to give some meaning to the words used, it might have been held that they were too vague to express what share the testator intended her to take. But where there is property in which she can, by law, take a share, I think the words "her share" may well have a distinct and definite meaning attached to them. She will only take her share in that portion of the property which she can by law take; and her share will, therefore, be satisfied out of the personal estate.

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I think the testator meant to say,—“Whatever that personal estate may be at the time of my death, she shall have her share of it. In case I buy more land, she will lose something; but in case I sell land and turn it into personal property, she will gain something; but whatever the personal estate may consist of, she is to have her share of it.” I think he used the words “her share” as synonymous with “her legal share”—“her lawful share”—“her rightful share”—“the share which the law gives her”—“the share which according to law and to the statutes passed for that purpose, the Legislature and the law of the country have thought it right and reasonable she should have in her father’s estate.” That is, I think, a distinct and plain meaning, and that which is intended by the words “her share.”

I do not agree with the argument, that the words “her share” mean “an equal share with other brothers and sisters,” if extended to a share given by the testator, and not confined to such as she would be entitled to in  
the

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the case of intestacy. In that respect, I follow the reasoning of Mr. *Colt*, that there must then be some reference to the class which is to take, and it should have been said, "a share with her brothers and sisters," or a "share with the rest of the other children." In that case, as it was very properly stated, the words "her share" would have meant an equal share. In this case, however, the testator having said nothing of that kind; but having merely said, "Her share in whatever property I may die possessed of," that share is in my opinion such as I have defined it to be.

It was suggested that the testator had himself subsequently put a construction upon this promise. Even if that evidence were admissible, I am not clear that he has. I am not at all clear that he had not the whole matter present to his mind when he wrote the letter of April, 1845. He may probably have thought he was not bound by it. In fact the Plaintiff's husband states, he did not know but that he was precluded by the testator's will. The testator may have thought that he had made a mere empty promise, and that he had a right to change his intention by his will. But I cannot allow any supposition of what the testator might have thought to vary what I consider to be the fair and true construction of the promise into which he has clearly entered.

That is how the rights of the parties would have stood if the Plaintiff had filed his bill the moment after the death of the testator, or the moment that they discovered their rights. I have now to consider the arguments used with respect to the *laches* and acquiescence and election of the Plaintiff.

Now, with respect to *laches*, undoubtedly a considerable

siderable time has elapsed, upwards of three years; but having regard to the view which the Court takes of cases of this sort, I think that that is not such a lapse of time as ought to bar the Plaintiff from obtaining relief in this suit. In the first place, this is to be considered:—that it is always a painful thing to file a bill of this description. It is necessarily a bill against persons to whom you are attached, members of your own family; it is not exactly the same as if the Defendants were mere strangers.

It is impossible, I think, to lay stress upon the letter of the 29th *May*, 1862. It was said that Mr. *Laver*, by that letter to his brother-in-law, written to him shortly after he came of age, purposely delayed the suit, running the chance of whether, by the death of the son previously to twenty-one, he might not acquire the whole of the property, and, if not, that he might then institute this suit. In answer to that argument, the evidence that the Plaintiff did not know of his rights by law is very material, and the evidence of Mr. *Kearsey* upon that part of the case is conclusive. The law will not allow that ignorance of it shall excuse any man from his acts, whether of a criminal or a civil nature—a rule inseparable from the due administration of the law. But ignorance of the law will thus far protect a man: it will shew that he did not act from the particular motive which might be attributed to him, if he had been fully cognizant of his rights. That, therefore, is, in my opinion, very valuable evidence to shew that the motive to which I have referred was not the real motive actuating the Plaintiff. I feel satisfied, that if any person knew what was actually passing through the mind of the Plaintiff at the time, it would be found that he was merely writing a few civil words, and that, when the son came of age, he wished to break his intentions

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tions to him in a manner which was the least disagreeable. I am satisfied, upon a general view of the case, that the letter of the Plaintiff did not amount to an assertion of the particular intention of running the chance of the son's dying under twenty-one.

The only other thing which I have now to consider is the effect of the decree made in 1860. I think it does not affect this question. That was a decree for the administration of this testator's estate, directing the accounts to be taken; the certificate has not been issued, and a claim is now made on the estate. A claim can be made on the estate, either by application in the cause itself, or by means of a substantive proceeding. If it can be made in the cause itself, then it is a mere matter of course to allow it to be made at any time prior to the certificate being approved; and indeed, subsequently to that period, before a division of the fund, providing the claimant make an application to the Court for that purpose, and pay the costs which he has occasioned by not applying sooner. But if the claim cannot be made in the suit, and a substantive proceeding be necessary for that purpose, it does not vary or alter the case.

It is of great importance that all persons should understand, that when a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise, with a particular view, which affects the interests in life of his own children and of the persons who become united to them, this Court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised. It is upon these principles that the Court has acted in all such cases;

cases ; it exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words, by compelling him to perform what he has undertaken. That being so, I think that the relief which I must give the Plaintiffs is this :—Declare that they are entitled to one-third of the personal estate of the testator in this suit, after the payment of the debts and testamentary and funeral expenses and costs of the administration suit. Then the Plaintiff may go in in the other suit to prove for that third, and for the costs of this suit; and the Defendants can have their costs out of the estate in that suit.

The bill must be amended, as suggested by Mr. *Southgate*, but the order I have made as to costs will not include those of the amendment of the bill, or of Mr. *Laver* in his original character of a Defendant to the bill. The proposed amendment of the bill was a very proper one; in fact, I think I could not have made the decree without it.

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Where partners, after the expiration of the term agreed upon by the articles of co-partnership, continue to carry on the business at will, without change, this partnership is regulated by the articles, so far as they are applicable to the new state of circumstances, but such of the articles as are inconsistent with a partnership at will have no application.

By articles for a partnership for seven years, a partner, upon certain default of his co-partner, had power to dissolve, and thereupon, the defaulting partner was to be considered as quitting the business for the benefit of the partner giving the notice, who was to have the option of taking the property and effects of the partnership at a valuation. Held, that this clause did not apply to a partnership continued at will after the expiration of the seven years.

BY articles of partnership, dated the 17th of *July*, 1839, and made between the Plaintiff Mr. *Clark* and the Defendant Mr. *Leach*, they covenanted to be partners as merchants, &c., for the term of seven years from the 1st of *July*, 1839. The articles provided for an equality between them, as to profits, losses, capital, monthly drawings, &c., and provided for the mode of keeping and settling the accounts. It then provided "that the partners shall, at all times, during the continuance of the said partnership, diligently and faithfully employ themselves, respectively, in the conduct and management of the said business and the concerns of the said partnership, and devote the whole of their time and attention, during the usual hours of business, to the same."

The articles then provided, that neither of the partners should transact business, &c., &c., with any person, after he should be requested by the other not to do the same, nor compound debts, nor accept bills out of the ordinary course, or be bail, &c., &c., and then followed this proviso :—

"Provided always, that if, contrary to the several agreements hereinbefore contained, either of the said partners shall neglect or refuse to attend the business of the said partnership, or if either of the said partners shall wilfully neglect or refuse to keep proper and just accounts

accounts, or shall transact business," &c., &c., "with any person after he shall be requested not to do the same," &c., &c. [then follows a specification of the other acts previously forbidden] "then and in any of the said cases, the other of the said partners, if he shall think fit, shall be at liberty to dissolve the said partnership, by giving to the partner who shall offend in any of the particulars aforesaid a notice in writing declaring the said partnership to be dissolved and determined. And the said partnership shall, from the time of giving or leaving such notice, or from any other time to be therein specified for the purpose, absolutely cease and determine accordingly," &c., &c., "*And the said partner to whom the said notice shall be given shall be considered as quitting the said business for the benefit of the partner who shall give the said notice.*"

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The articles afterwards provided, that in such case the partner giving the notice should have the option of purchasing the share of the other, of and in the property, credits and effects of the partnership at a valuation, the price to be paid by certain instalments, and if he should decline, they were to be converted and divided; and if such partner should decline to purchase the share upon the terms aforesaid, then the partnership accounts and affairs should be adjusted and wound up in the same manner as is hereinbefore provided, in the event of the death of either of the said partners and the surviving partner declining to purchase the share of the deceased partner.

The seven years expired on the 1st of *July*, 1846, but the partners continued their business as before, without any alteration of the terms, until the 30th of *June*, 1862, when the Plaintiff, alleging that the Defendant had wholly neglected to attend to the business, gave him a written

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written notice, which, omitting the immaterial parts, was in the following terms :—

“In consequence of your continued neglect to attend to the business of our partnership, I hereby give you notice, that I declare, the said partnership to be dissolved and determined as from and after this date. Having regard to your continued neglect of our partnership business, I am constrained to avail myself of the provisions given by our articles. By the articles, I am entitled to take over and become the purchaser of your share in the property, credits and effects of the partnership, to be ascertained by arbitration, and this I am desirous and prepared to do in the mode provided by the articles.”

The Defendant disputed the Plaintiff’s right to give such notice, but said he was content to acquiesce in an immediate dissolution, on the usual terms of the assets being realised and divided.

The Plaintiff continued to carry on the business in the name of *Leach & Clark*, and Defendant set up business in the neighbourhood on his own account, using the name of *R. Leach & Co., late Leach & Clark*. On the 4th of *August*, 1862, the Defendant caused printed cards and circulars to be addressed and sent to the customers and connections of the late firm. The cards were,—“*R. Leach & Co. (late Leach & Clark)*.” And the circulars were in these terms :—

“Gentlemen,—I beg to inform you that the partnership which subsisted between myself and Mr. *John Clark*, under the firm of *Leach & Clark*, has been dissolved, and that I shall, from this date, carry on business under the firm of *R. Leach & Co.*

“Soliciting

"Soliciting a continuance of your much esteemed favors, and referring you to the signature of my new firm.

"I am, gentlemen, yours respectfully,

"Robert Leach."

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A correspondence ensued, and, ultimately, the Defendant's solicitors wrote to the Plaintiff's solicitors as follows :—

"6th August, 1862.

"Dear Sirs, — We find from our client this morning, that Mr. Clark invariably uses the name of the late firm in all his business transactions and at his place of business. In our judgment, he has no exclusive right of so doing, and therefore our client will continue to follow the example which yours has set. If your client be willing to abandon the name of the old firm, so will ours.

"Clarke & Morice."

The Plaintiff did not accede to this proposal, but filed a bill, praying a declaration that the partnership was dissolved as from the 30th of June, 1862; that the affairs of the partnership might be liquidated on the terms insisted on by the Plaintiff; that the Defendant might be restrained from resuming or carrying on the business of a merchant, &c., under the style or firm of *Leach & Clark*, and from further using the name of that style or firm, and from issuing or sending, to any person or persons, any further copies of the said card or circular of the 4th day of *August*, 1862, or any other card or circular signifying or importing that the business carried on by the Defendant is a continuation of the business carried on by the late firm of *Leach & Clark*, and from soliciting any customer of the said late firm to become a customer of the Defendant, or to cease from

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from employing the Plaintiff in the business formerly carried on by their late firm of *Leach & Clark*.

Mr. Selwyn and **Mr. Druce** for the Plaintiff. After the expiration of the seven years, the partnership continued on the same terms as before, and the partners were, therefore, subject to the consequences of a neglect to attend to the business. The Defendant being in default, and the notice having been duly given, the Plaintiff's right has arisen, and the Defendant must now be considered as having relinquished the business for the "*benefit*" of the Plaintiff, and the partnership must be wound-up on that footing.

Secondly. The Plaintiff is entitled to an injunction to restrain the Defendant from acting in violation of the articles and in derogation of his grant or cession of the partnership business to the Plaintiff. He has no right to use the name of the old firm, or to issue circulars "soliciting a continuance" of the custom, and to attempt to take away "the benefit" of that business, which belongs, by contract, to the Plaintiff. In *Burrows v. Foster* (a), it was agreed that the Plaintiff "should have the benefit and advantages of the business and connections of the said two copartnership firms," and an order for an injunction was penned by Lord Justice *Turner*, which restrained the Defendants from soliciting the business of the old customers and connections.

[*The Master of the Rolls*. Has not the Defendant a right to say that he lately belonged to a certain firm, and cannot he advertize that fact. The difficulty is, if he cannot be prevented carrying on the same business, is he not at liberty to solicit the public at large, and to do so by telling as is the truth, that he belonged to a late firm?]

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(a) *M.S., Lords Justices, 13th May, 1862.*

The Defendant may carry on business where he likes, even next door, but not so as to interfere with the Plaintiff's rights; he can do no act in contravention of his distinct contract. The partnership articles contemplate a continuance of the business, of which the Plaintiff is to have the "benefit," and the Defendant can do no act, true or false, which will deprive the Plaintiff of that which he has contracted for. He cannot represent that his is a continuation of the old partnership, or solicit, as he is in the habit of doing, "a continuance" of the favors of the customers of the old firm; *Howe v. M'Kernan* (*a*); *Churton v. Douglas* (*b*); *Parsons v. Hayward* (*c*); *Hayward v. Parsons* (*d*).

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Mr. *Baggallay* and Mr. *Knox Wigram* for the Defendants. After the expiration of the seven years, the clause in question was no longer binding, any more than the clause providing for the continuance of the partnership for seven years. Such a clause was quite inapplicable to a partnership at will, determinable *instanter*. Besides the Plaintiff was not in a position to give the notice; the evidence does not shew any such wilful neglect, on the part of the Defendant, as justified it, and the Plaintiff was precluded from taking advantage of the proviso by his own flagrant breaches of the articles.

But supposing the Plaintiff entitled to the benefit of the proviso, still he has no right to the injunction asked. There is nothing in the articles which prevents the Defendant carrying on the same business wherever he pleases; but to entitle the Plaintiff to the injunction he cannot stop short of saying that the Defendant shall  
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(a) 30 *Beav.* 547.  
(b) *John.* 179.

(c) 31 *Beav.* 199.  
(d) 31 *Law J. (Chanc.)* 666.

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not carry on the same business at all or at any place. The nature of the "benefit" contemplated by the articles was the place of business, the possession of the "property, credits and effects," that is, of the stock, books, &c. These would naturally attract to him the old customers, especially those indebted to the concern.

*Burrows v. Foster* differs from this case, for, in that case, there had been a liquidation of a partnership, and a sale to a stranger of the business.

Mr. Selwyn in reply.

*The Master of the Rolls.*

My strong impression is, that this is not a case for an injunction, and that, on the true construction of the articles, this clause is only to continue in force and be available while the partnership for seven years was in force, and that when the partnership became a partnership at will, this clause was no longer applicable to that altered state of things.

*The Master of the Rolls.*

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The further consideration I have given to this case confirms the impression I received yesterday from the argument in Court.

By the articles of agreement a partnership was entered into for seven years, and after the expiration of that period it continued as before. It is admitted that the articles were binding on the parties after the seven years had expired, so far as they were applicable to that new state of things. There is no question and no dispute

dispute on that point, but the only question is, how far those provisions are applicable to that altered state of things. Here is a provision which, in certain events, gives to a partner a right to give notice to dissolve. When, after seven years had expired, they continued to carry on the partnership, this is clear:—that a new term of seven years did not arise, and that the clause, creating a partnership for seven years, was not applicable to the new state of things, and therefore that it did not affect the partners.

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There are many things to which the provisions of the articles do apply, as, for instance, the division of the profits and loss, the drawing out money, the manner in which the books are to be kept and the accounts settled. These were applicable to the altered state of the partnership when it became a partnership at will, for they were strictly applicable to the new state of things.

The question here is, whether the power of giving notice with its consequences is one of the former or latter class of provisions. Now it is incidental to the character of a partnership at will, that either partner may, at any moment, give notice to dissolve, and therefore no special provision is necessary for that purpose. It is therefore obvious that if there had been a provision that six months' notice should be given to dissolve, as soon as it had become a partnership at will, this would have been quite inconsistent with the legal incidents of a partnership at will, and inapplicable to the then existing state of things.

Under the articles, one partner was bound to the other to carry on the partnership business for seven years. One might have totally neglected the business from the beginning,

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beginning: was the other to be bound to work for the seven years for the benefit of the negligent partner? No; it was intended that the active partner might give notice of dissolution and carry on the business for his own benefit. It was not necessary that this article should continue after the seven years, because neither of the partners was then bound to continue or compellable to work for the benefit of the other, for he might give notice of dissolution at any moment.

To hold otherwise, it would also involve this inconsistency:—if after the seven years the negligent partner gave notice of dissolution, the partnership would have to be wound up as in any ordinary case, that is as the partners might agree, or by a sale and division. But if the active partner give the notice, then the penal consequences are to follow, and it is to be wound up in the peculiar form mentioned in this proviso. It is scarcely possible that this can have been the intention of the parties.

It is obvious that this state of things might occur:—one partner might be extremely active for six years and after that cease to attend; could the other in the last two or three months give the notice and thus obtain the whole of the business for an indefinite period of time? It is clear that this proviso had reference only to the past, for it is difficult to suppose, that some default at the end of that time was to give the active partner a right to the business as long as he should live, and which right, but for the neglect of five days, would be lost.

I am of opinion that this is not the proper construction of these articles, and that, according to their true construction, this provision is not applicable to a partnership at will, that it was binding only during the term

term of seven years, and had for its object the power to compel the attendance of the partners during that time, in order that if one partner refuse to attend to the business, the other shall be at liberty to carry it on for his own benefit and advantage.

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A question was argued as to the meaning of the word "benefit," and how far the active partner is to have the advantage of that "benefit." The case of *Burrows v. Foster* (a) was cited, to shew what was the meaning of the word "benefit," but it does not apply to this case. It explains the meaning of the word "benefit," and that it has such a meaning, that when one gives up a business for the benefit of another, he will be restrained, by the order of the Court, from sending circulars to or otherwise soliciting the customers of the partnership, and from obtaining their custom to the detriment of the partner to whom the business has been given up. I adopt that definition of the word "benefit." The expression here is, "the partner to whom notice shall be given shall be considered as quitting the business for the benefit of the partner who shall give the said notice," consequently, if this clause had reference to the state of things during the term, the Plaintiff would be entitled to the benefit of the decision in *Burrows v. Foster* (a). But it does not apply to the case of a partnership at will carried on after the expiration of the term: nor does it assist the Plaintiff, assuming it had so applied, for he must then shew how long the benefit was to enure to the active partner. Suppose the active partner gave notice a few months after the partnership began, he would then be entitled to the "benefit" of the business for the seven years; but why is he entitled to have it beyond? The negligent partner might say "I intended and engaged to carry on  
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(a) *Ante*, p. 18.

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the business in partnership with you for seven years, but after that time I intended carrying on the business alone." If that be the true construction of the proviso, then, assuming that it applies to a partnership at will, the same construction would follow, and the benefit to be derived from the cession of the business, only lasts during the continuance of the partnership; but a partnership at will may be determined at any time.

I am therefore of opinion, on the construction of this partnership agreement, that this provision has no reference to the altered state of things when it became a partnership at will, and also, that on the words of the proviso, it was not intended to give any benefit beyond the term for which that partnership was to last. The consequence is, that the Plaintiff was not entitled to give the notice.

*Burrows v. Foster* was a case where the two firms had been wound up and the business sold for valuable consideration, and after that, an attempt was made by the partners to derogate from the sale, by setting up business for themselves and taking away the customers of the firm.

I am therefore of opinion, in this case, that unless the parties can agree in the mode of winding up the partnership, it must be wound up in the ordinary mode.

The Plaintiff must pay the costs up to and including the hearing and of the motion for the injunction. I am of opinion that it was his contention which occasioned the suit.

NOTE.—Affirmed by Lord Westbury, L.C., 30th January, 1863.

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## PHILLIPS v. BEAL (No. 1.)

**W.** *B. HILL*, the testator, by his will dated in  
1846, bequeathed as follows :—

"I give, devise and bequeath all my household goods, furniture, plate, linen, china, glass, together with all bills, bonds, notes of hand, mortgages and everything that I may die possessed of, unto my dear wife *Mary Anne Hill* for her life," &c., &c., &c. "And from and immediately after the death of my said dear wife, I then give, devise and bequeath the whole of my effects that may be then remaining unto and to the use of *Elizabeth Offrida Hill Skinner*" (his daughter).

The testator was a wine merchant and had a considerable quantity of wine, much of which was in the cellars of his house, the rest in other places. Under the will the widow claimed the wine absolutely.

Mr. *Selwyn* and Mr. *Marett*, for the widow, contended that the wine, being one of those things which *ipso usu consumuntur*, must pass to her absolutely; and that any doubt was cleared up by the passage in the will, in which the testator contemplated consumption by speaking of what "might be then remaining."

Mr. *Follett* and Mr. *C. Hall*, for the daughter, contended that the wine was given with the furniture, &c., to the wife for life, with remainder to the daughter. Moreover that this was not the common case, as the wine belonged to the testator as his stock in trade.

Mr. *Fooks* and Mr. *Rowcliffe*, for other parties.

*The*

*July 11.*

A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, &c., and everything he died possessed of, to his wife for life, and he bequeathed the whole of his effects that might be remaining after her death to his daughter.

*Held*, that the wife took absolutely the wine which the testator had for his private use, but a life interest only in the rest.

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*The Master of the Rolls.*

I am of opinion that the widow is entitled to all the wine in the house, but not to that used for the purpose of trade. Wine is one of the things which *ipso usu consumuntur*, and if the testator was keeping the wine for his own consumption, and not for the purpose of sale, it belongs to the widow. This must be ascertained.

NOTE.—*Foley v. Burnell*, 1 Bro. C. C. 275; *Porter v. Tournay*, 3 Ves. 311; *Randall v. Russell*, 3 Mer. 194; *Andrew v. Andrew*, 1 Coll. 690; *Twining v. Powell*, 2 Coll. 262.

## PHILLIPS v. BEAL. (No. 2.)

July 11.

After an administration decree, an executor has no right, as against the parties interested in the estate, to give an acknowledgment to take a debt barred by the Statute of Limitations out of its operation.

THIS was a summons to vary the certificate. The testator was indebted on two promissory notes for 400*l.* each, dated the 23rd of *March*, 1846, and interest had been paid on them to *March*, 1851.

The testator died on the 31st of *May*, 1851, and on the 8th of *May*, 1857, the bill in this cause was filed for the administration of his estate, and the decree was made on the 10th of *February*, 1858. After the decree, and on the 30th of *March*, 1858, the executrix gave to the holder of the notes a written acknowledgment that the bills still remained owing and unpaid with interest from the 23rd of *March*, 1851; and the question was, whether the acknowledgment was effectual as against the other persons interested in the testator's estate, to take the case out of the Statute of Limitations.

Mr. Fooks for Sarah Salter, the holder of the notes. The institution of a suit does not suspend the discretion of

of an executor, and he may pay a debt proved to be justly due though barred by the statute; *Stahlschmidt v. Lett* (*a*). So an executor may retain his debt, though barred by the Statute of Limitations during the lifetime of the testator; *Hill v. Walker* (*b*). The acknowledgement is equivalent to a promise to pay, or to do that which he was morally bound to do and legally justified in doing.

Mr. *Follett* and Mr. *C. Hall*, *contra*, were not heard, but they referred to *Fuller v. Redman* (*c*).

Mr. *Rowcliffe* for the husband of the Plaintiff.

*The Master of the Rolls.*

It is clear I cannot do it. It is settled by *Shewen v. Vanderhorst* (*d*), that after decree, an executor cannot exercise any discretion at all, and that he is bound to take the objection of the Statute of Limitations, and that any creditor or other person interested may insist on having that defence set up. After decree an executor can do no act to vary the rights of the parties.

The right of retainer stands on a different footing. The executor, having the right of retaining his debt before the suit was instituted, it has been held, that is not forfeited by the institution of a suit.

(*a*) 1 *Smale & Gif.* 415.  
 (*b*) 4 *Kay & J.* 166.  
 (*c*) 26 *Beav.* 614.

(*d*) 1 *Russ. & My.* 347,  
 2 *Russ. & My.* 75.

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The several receipts by joint tenants of a portion of a trust fund does not destroy the joint tenancy as to the remainder of the fund.

A testator gave the residue of his real and personal estate to his nephews and nieces living at his death. But if any should be then dead, their offspring were to be considered to stand in the place of their parents and to take "the same benefit." Held, that though the nephews and nieces took as tenants in common, their offspring took as joint tenants.

THE testator devised his real and personal estate to trustees in trust to convert and, after making certain bequests, "the remainder of his property real and personal of whatever description (after the deductions before recited) he gave and bequeathed, in equal portions, share and share alike, to his different nephews and nieces, the sons and daughters of his late brothers and sisters, *William Merritt, Ann Leak, Mary Dannatt and Frances Holmes*, or to such of them as might be living at the time of his death. But if any of them should then be dead, and have left offspring, the said offspring were to be considered to stand in the place of their parents, and to take the same benefit from the said bequest."

The testator died in 1845, subsequently to the month of April, in which he made a codicil.

Mary Swift, one of the nieces and a daughter of *William Merritt*, died in March, 1845, in the life of the testator, and her children became entitled to her share, by substitution.

The trustees made several small payments on account of unequal amounts to the children of *Mary Smith*. One of them having died, the question arose, first, whether the offspring of the nephews and nieces took in joint tenancy, and secondly, whether it had been severed by their receipts on account of their shares.

Mr.

Mr. *Kay* argued, first, that the words of severance did not apply to the substituted gift to the offspring. *Bridge v. Yates* (a); *Penny v. Clarke* (b).

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Secondly. That the small sums received on account did not sever the joint tenancy as to the residue. *In re Barton* (c).

Mr. *W. W. Cooper*, *contrà*. The joint tenancy was severed by the receipt of a part of the fund, it destroyed the nature of the interest in the whole fund, by altering the rights of the parties to it. "The severance of the joint tenancy is a mere matter of evidence, it is not necessary to shew a specific act of division of each part of the property, if there has been a general dealing sufficient to manifest the intention to divide the whole. The acts done, as to parts, may be evidence as to the rest, as to which no act has been done. Their division of all other parts of the estate is evidence of their intention to divide this whenever they could lay hold of it;" *Crook v. De Vandes* (d); *Williams v. Hensman* (e). The receipts have been unequal, and it is therefore impossible to treat the remainder as held in joint tenancy.

Secondly. The children were not, originally, joint tenants, for the offspring are to take "*the same benefit*" as their parents, and must therefore, like them, take in the same way, that is "*in equal portions, share and share alike*," or as tenants in common.

The MASTER of the ROLLS.

I am of opinion that this is a joint tenancy; I see nothing like severance. If a nephew is dead at the death

of

(a) 12 *Sim.* 645.(d) 11 *Ves.* 333.(b) 1 *De G., F. & J.* 425.(e) 1 *John. & Henr.* 546.(c) 10 *Hare*, 12.

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of the testator his offspring is "to be considered to stand in the place of their parents," and take the same benefit, that is, they shall take their parent's share, but they take it as joint tenants.

A separate dealing by joint tenants of the property may sever the joint tenancy and create a tenancy in common. But I do not think this inference is to be drawn merely from the circumstance that a trustee, having realised part of the estate, has paid the money received, in certain proportions, to the parties in severalty. As to the money not received, they still remain joint tenants.

If a testator were to devise twenty houses to a trustee, in trust to sell and pay the proceeds to ten persons as joint tenants, though one house were sold and the purchase-money divided, that would not shew that the other nineteen houses were to be held by the owners as tenants in common, and that when sold, the produce was to be divided equally between the surviving owners and the representatives of those who had died. Until some act is done to sever, the interest remains as it previously was, an interest in joint tenancy. The burthen of proof lies on those, who contend that a joint tenancy has been severed.

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JONES v. SOUTHALL. (No. 2.)

Nov. 21.
Dec. 9.

ON the 27th June, 1842, *Cath. Wood*, in contemplation of marrying *Benjamin Crane*, the widower of her deceased sister, executed a settlement, by which, in consideration of the marriage, she assigned to the trustees, Mr. *Grape* and Mr. *Southall*, a mortgage of 1,200*l.* on the *Broadwas* turnpike road, a mortgage of 400*l.* on a certain reversionary interest, a bond debt of 200*l.* She declared that these and a mortgage debt of 938*l. 9s. 2d.* on *Sapling Mill*, a mortgage to her of 700*l.*, also 2,000*l. £3 : 10s. per Cents.*, which had been transferred into the names of trustees, should be held upon trust for her until the solemnization of the said intended marriage, and from and after the solemnization thereof, upon trust during the joint lives of the said *Benjamin Crane* and *Catherine Wood* for her separate use without power of anticipation, and after the decease of either of them, upon trust for the survivor for his or her life, and after the decease of the survivor, upon trust for the children of the said intended marriage, and in case of none, upon trust, in case *Catherine Wood* should survive *Benjamin Crane* (which happened), then from and after his death and such failure of children as aforesaid, in trust for *Catherine Wood*, her executors, administrators and assigns, but if the said *Catherine Wood* should die in the lifetime of *Benjamin Crane*,

A. B. bequeathed her residue to such person as *C. D.* should, by deed or will, appoint, and in default to his next of kin. *C. D.* died in the life of *A. B.* Held, that his will could not operate as an execution of the power under the 1 Vict. c. 26, s. 27, and that his next of kin were entitled to *A. B.*'s residue.

By her will, the testatrix directed the trustees of a settlement executed by her to hold "all and singular the trust moneys comprised therein, and the securities on which the same should be invested" on trust to pay legacies, &c. Held, that the

bequest of such of the trust moneys as had been called in, received and re-invested by the testatrix in her life was deemed.

A testatrix, after stating that she was desirous of leaving certain legacies, requested her supposed husband to pay certain legacies out of his own estate. He predeceased her. Held, that the legacies were demonstrative and payable out of the testatrix's estate.

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Crane, then from and after his death and such failure of children as aforesaid, in trust for such person and as *Catherine Wood*, by any deed or writing or by her last will, should notwithstanding coverture appoint, and in default of such appointment, in trust for such person or persons as, at the decease of *Catherine Wood*, would have been entitled to her personal estate under the Statutes of Distribution, in case she had died unmarried and intestate and without issue.

The ceremony of marriage was performed, and the parties to it cohabited during their joint lives as husband and wife. But, as no lawful marriage could be contracted between these persons, the trusts never arose.

On the 4th of *October*, 1842, *Cath. Wood*, calling herself *Crane*, made her will, on the construction of which the present questions arose. The will, after reciting the marriage settlement, the power of appointment therein contained in the event of her husband surviving her, and she should leave no child, proceeded thus:—

“Now I do hereby ratify and confirm the said settlement, and in pursuance and exercise of the power thereby reserved to me and of all other powers enabling me in this behalf,” &c., “appoint that the trustees or trustee for the time being of the said settlement do and shall stand possessed of and interested in all and singular the trust moneys comprised in such settlement, and the securities on which the same shall be invested, from and after the decease of the said *Benjamin Crane* and such failure of issue as in the said settlement mentioned, in trust for such of the several persons hereinafter named as shall be living at the time of the decease of the said *Benjamin Crane*, and in the parts, shares and proportions hereinafter also mentioned, to whom I give and bequeath the same accordingly (that is to say).” She then

then gave a number of pecuniary legacies, and proceeded :—“ And as to the residue of the trust moneys and personal estate comprised in *the said settlement*, from and after payment of the said legacies (which I direct to be paid at the end of six months after the decease of the said *Benjamin Crane*) and the expense of proving this my will, I do hereby give and bequeath one moiety thereof to such person or persons as my said dear husband *Benjamin Crane* shall by deed or will direct or appoint, and *in default of appointment to his next of kin*, and the other moiety thereof to my sisters” *Jemina Wood* and *Ann Jones* in equal shares.

“ And whereas, on my marriage with my said dear husband *Benjamin Crane*, he became entitled in right of such marriage to certain personal estate belonging to me, which was not comprised in the before-mentioned settlement, and I am desirous of leaving certain legacies payable immediately on my decease, I do therefore hereby request my said dear husband to pay, out of such personal estate, notwithstanding the same is now become his own property, the following legacies,” viz. to the poor of the parish of *Knightwick* 10*l.*, to the poor of the chapelry of *Doddenham* the like sum of 10*l.*, to my servant *Rebecca Roberts* 10*l.*, to *Martha Chambers* 50*l.*, and to *Thomas Finch* 10*l.*, such three last-mentioned legacies to be paid within six months from my decease.

On the 5th of June, 1844, *Benjamin Crane* made a will, by which he gave all his real and personal estate to the testatrix *Catherine Crane*, subject to the payment of his debts and an annuity of 20*l.* to the Defendant *Sarah Pardoe*. He died on the 27th of December, 1846, without having had any issue. The testatrix survived

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him; she made no alteration in her will, and died on the 2nd of January, 1857.

At the hearing of this cause in 1861 (*a*), the Court was of opinion, that the will of the testatrix, which had been proved in the Probate Court, was a valid disposition of the settled property, and inquiries were directed as to the position of her property.

The Chief Clerk certified, that shortly after the death of *Benjamin Crane*, the settlement, with a deed of even date assigning the mortgage debt of 700*l.* to the trustees of the settlement, were given up by them to the testatrix, and that she afterwards destroyed them.

That in 1855, a sum of 600*l.*, being one half of the 1,200*l.* due on the mortgage of the turnpike tolls, was paid to the testatrix, and was, on the 13th of July, 1855, lent by her to Mr. *George Peake* on his bond and a mortgage dated the 24th of August, 1855, and made between *G. Peake* of the one part and the testatrix of the other part, and that it remained so invested at her death. That the second half of the 1,200*l.* due on the mortgage of the turnpike tolls had been allowed to remain on that security. That at the date of the settlement, the testatrix was transferee of this mortgage of tolls, but that neither the transfer to her, or from her to the trustees, had ever been registered as required by the 3 Geo. 4, c. 126, s. 81.

That in 1846, during the life of *Benjamin Crane*, the sum of 400*l.*, secured by mortgage, was paid off and invested by the trustees of the settlement, in their own names, in the purchase of 411*l.* 16*s.* 10*d.* £3 per Cent.

Reduced

(*a*) 30 Beav. 187.

Reduced Annuities, and that, about the same time, £111 16s. 10d. Consols were transferred into her name.

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That the 200*l.*, due on bond, had been paid to her by the debtor in April, 1847, with the consent of the trustees.

That the 938*l.* 9s. 2*d.*, due on the mortgage of Sapey Mill, remained on that security at the death of the testatrix, but that in 1847, and again in 1851, she had endeavoured to sell the premises by auction, without the intervention of the trustees.

That the 2,000*l.* Consols had been transferred by the trustees at the request of the testatrix, into her name, in which they stood at the time of her death.

Mr. Selwyn and Mr. T. A. Roberts, for the Plaintiff, the sole next of kin of the testatrix. First, this was a mere voluntary settlement, and the property comprised in it was not effectually vested in the trustees; as for instance, the turnpike bond; 3 Geo. 4, c. 126, s. 16; *Jones v. Jones* (*a*); it was incomplete and ineffectual, and this Court will not interfere, in favor of volunteers, to perfect it; *Bridge v. Bridge* (*b*); *Jefferys v. Jefferys* (*c*).

Secondly. The gift of the trust moneys comprised in the settlement was deemed by the destruction of the settlement; *Pigot's Case* (*d*); *Henfree v. Bromley* (*e*); *Whelpdale's Case* (*f*); *Stephen's Commentaries* (*g*); and also by the testatrix resuming possession of the property and altering the investments. It is not sufficient to be able

(*a*) 5 Exch. Rep. 16.
(*b*) 16 Beav. 315.
(*c*) Craig & Ph. 138.
(*d*) 11 Rep. 26 *b.*

(*e*) 6 East, 309.
(*f*) 5 Rep. 119 *a.*
(*g*) Vol. 1, p. 505 (5th edit.).

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able to trace specific moneys into other investments, money cannot be so ear-marked or traced. It is necessary that the specific gift must remain *in specie*; *Williams on Executors* (*a*) ; *Badrick v. Stevens* (*b*) ; *Rider v. Wager* (*c*) ; *Barker v. Rayner* (*d*) ; *Gardner v. Hatton* (*e*) ; *Pattison v. Pattison* (*f*).

Thirdly. The will of *Benjamin Crane* operated as an execution of all powers, 1 Vict. c. 26, s. 27, and, amongst them, the power given by the will of *Catherine Crane*; but if it did not so operate, the gift in default of appointment to the next of kin of *Benjamin Crane* cannot take effect; there could be no default, if there was no power to execute; *Baker v. Hanbury* (*g*) ; *Sugd. on Powers* (*h*).

Fourthly. The small legacies, which the testatrix requests her husband to pay out of the unsettled property, fail altogether. They are payable out of a particular fund possessed by Mr. *Crane*, and not out of the testatrix's property, and they are mentioned in terms of a recommendation to him, and not as bequests out of her own property.

Mr. *Lloyd* and Mr. *A. Smith* for the next of kin of *Benjamin Crane*. First, the validity of this settlement has been established; but whether valid or not, or whether destroyed or not, it has the effect of pointing out the property referred to by the testatrix in her will, and besides she expressly ratifies the settlement. Secondly, this is not strictly a specific legacy, it is a gift not only of the moneys in the settlement, but of "the securities

on

- (*a*) Vol. 2, p. 1132.
- (*b*) 3 Bro. C. C. 431.
- (*c*) 2 Peere Wms. 328.
- (*d*) 5 Madd. 208.

- (*e*) 6 Sim. 93.
- (*f*) 1 Myl. & K. 12.
- (*g*) 3 Russ. 340.
- (*h*) Page 321 (7th edit.)

on which the same shall be invested," and it is, therefore, only necessary to trace the money into an investment. But, as to the rest, there is no ademption where the change has been for convenience and security, and not for the purpose of ademption; *Clough v. Clough* (*a*); *Clark v. Browne* (*b*); *Ashburner v. Macguire* (*c*); *Dingwell v. Askew* (*d*); *Fryer v. Morris* (*e*); *Le Grice v. Finch* (*f*).

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Thirdly, the power in *Catherine's* will, which never arose in Mr. *Crane's* lifetime, cannot be construed to be executed by his will; it was a power to a dead person. The statute 1 Vict. c. 26, s. 27, says, that a bequest of personal estate shall include any personal estate which the testator "may have power to appoint in any manner he may think proper, and shall operate as an execution of such power." How could this be an execution of a power purported to be given him by a will which first operated fifteen years afterwards? No power ever existed, and a power may lapse like a legacy, and here it cannot be said to have been executed. But that does not prevent the gift over from taking effect; the gift over in default operates either if the power is not executed or does not arise. The very event contemplated has arisen; he has not appointed; *Jones v. Westcoomb* (*g*); *Mackinnon v. Sewell* (*h*); *Warren v. Rudall* (*i*); *Murray v. Jones* (*k*); *Hardwick v. Thurston* (*l*); *Edwards v. Saloway* (*m*).

Fourthly. The legacies which the testatrix directed her husband to pay are demonstrative legacies.

Mr.

- (*a*) 3 *Myl. & K.* 296.
- (*b*) 2 *Smale & G.* 524.
- (*c*) 2 *Bro. C. C.* 108.
- (*d*) 1 *Cox*, 427.
- (*e*) 9 *Ves.* 360.
- (*f*) 3 *Mer.* 50.

- (*g*) *Prec. Ch.* 316.
- (*h*) 2 *Myl. & K.* 214.
- (*i*) 4 *Kay & J.* 603.
- (*k*) 2 *Ves. & B.* 313.
- (*l*) 4 *Russ.* 380.
- (*m*) 2 *Phill.* 625.

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Mr. *Baggallay* and Mr. *Freeman*, for the trustees,  
supported the legacies.

Mr. *Swan* for a legatee.

Mr. *Selwyn* in reply.

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### *The MASTER of the ROLLS.*

Dec. 9.

The first question is to whom did the moiety of the residue go, it is bequeathed to such persons as *Benjamin Crane* shall "by deed or will direct, and in default of such appointment his next of kin."

The Plaintiff contends that the moiety of the residue of the testatrix's estate passed, under the combined effects of the will of the testatrix and of *Benjamin Crane*, to the testatrix herself, and was therefore undisposed of and went to the Plaintiff, who was her sister and sole next of kin.

The Defendants contend that the power of appointment was never exercised by *Benjamin Crane*, and that the moiety goes, as in default of appointment, to the next of kin of the husband.

The first question I have to consider is, whether the will of *Benjamin Crane* operated as an execution of the power contained in this will of the testatrix? I am of opinion that it did not, and that because, in my opinion, no power created by the will of the testatrix had any existence until the death of the testatrix had given validity to the instrument itself. Indeed this is the first time that I ever remember it to have been argued, that a man could execute a power of which he was

was intended to be the donee named in the will of a person who survived him. Under the old law it is obvious that his will, having no reference either to the power or to the fund subject to it, could not have operated as an execution of any power; and under the 27th section of the new Wills Act (*a*), it is equally obvious that it would have no such operation. That section, which makes a general disposition by will operate as an execution of a power, treats such a disposition as evidence of intention to execute such power, and therefore makes such a disposition an execution of the power, unless a contrary intention appears on the face of the will. But it is obvious that no intention can be presumed respecting the execution of a power of the existence of which the testator is ignorant. In other words, the testator can, by his will, execute only such powers as are in existence when his will takes effect. He was not the donee of any power at his death, the time at which his will begins to speak, and unless he had survived the testatrix, he never could have become the donee of a power created by her will, which has no operation except from the day of her death.

The next question is, does the gift over in default of appointment take effect? and I am of opinion that it does. This is simply the case of a gift to a certain class of persons, provided a certain event does not happen. The class to whom the gift is made is the next of kin of *Benjamin Crane*, the event on which it is to take effect is, the non-execution of a power by him. That event has occurred, he has not executed the power. It is true that he has not executed the power, simply because he could not; but this does not, in my opinion, alter the case. His capacity or incapacity to influence the occurrence of the event on which the gift over is to take

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take effect is wholly immaterial. If the gift had been "to the next of kin of *Benjamin Crane* in the event of his predeceasing *A. B.*," the fact of death previous to that of *A. B.* would have given effect to the legacy, although the occurrence of the event depended, not on the will of *Benjamin Crane*, but on the will of God. Here, if he had survived the testatrix, he would have executed the power; he died before her, and therefore he did not execute the power, and as he has not done so, the gift takes effect in favor of his next of kin; this also appears to me to be the plain meaning of the testatrix's will, which might be thus expressed:—"I wish one-half of the residue to go as *Benjamin Crane* shall direct, if he does not or cannot give any direction on this subject, then I wish his next of kin to have that half."

The next question which arises, relates to whether there has been any ademption of the sum mentioned in the settlement. The testatrix, by her will, directs that *Grape and Southall* (the trustees of the settlement) shall stand possessed of "all the trust moneys comprised in such settlement, and the securities on which the same shall be invested," after the decease of *Benjamin Crane*, in trust for the persons mentioned in her will. The first question is, whether these are all adeemed, by reason of the trustees having delivered up the settlement to the testatrix and her having destroyed it. On the first of these, I entertain no doubt that such delivery and destruction did not produce any effect. The settlement never had any validity, as it was founded on consideration of a marriage which did not take effect, and the destruction of it did nothing. In my opinion the words of the will are simply a manner of describing the specific funds, by the division of which certain legacies are to be paid.

The

The next question is, whether the dealing with the funds by the testatrix, subsequently to the date of her will, has adeemed any, and which, of them? I will take them *seriatim*.

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The first is 1,200*l.* and interest secured by a mortgage of the tolls of *Broadwas* turnpike road. In 1855, 600*l.*, part of this, was paid off and lent by the testatrix to the Rev. *George Peake*, and was secured by his bond and mortgage. The remaining 600*l.* continued due on the security of the tolls at the death of the testatrix. I think that this fund is adeemed, to the extent of the 600*l.* paid to the testatrix.

It is contended, that, under the words "and the securities on which the same shall be invested," the legatees are entitled to follow out and trace the funds into the fresh securities into which they may have been invested by the testatrix from time to time, and thus preclude any question of ademption. I do not mean to say, that if the settlement had been valid and effectual, and if, in pursuance of the powers contained in it, the trustees had invested the settlement funds in fresh securities from time to time, considerable weight might not have attached to that argument, or that the words of the will might not, in that case, have been construed to mean, "the funds in settlement whatever they were," and if it were the true construction of the will, that only the funds subject to the settlement, and none other, should be applied in paying the legacies, then, as the settlement had no operation, it might support the argument, that the bequest had no operation at all, inasmuch as there were no funds in settlement; but if I am right in my opinion, that this is not the just construction of the will, and that these words in the will simply import a description of the funds specifically appropriated

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priated to the payment of certain legacies, then the reference to the securities on which they shall be invested merely applies to the existing security, by way of more completely identifying the fund, and does not operate as a bequest of future securities to be thereafter taken or future advances of any portion of these funds if they should be called in or paid off. In other words, I think that the words of the will are merely referential to another document as containing the description of the funds, and that they must be read exactly as if the testatrix, instead of using the words in the will, had enumerated the various funds which were mentioned in the document referred to, and which the certificate of the Chief Clerk has enumerated. The first fund therefore is, in my opinion, adeemed to the extent of one-half.

The second is a sum of 400*l.* and interest, secured by mortgage of a reversionary interest by *Richard Burnaby*. This also was paid off, and invested by the trustees of the settlement in the purchase of 411*l.* 16*s.* 10*d.* £3 per Cents. This fund also was, in my opinion, adeemed for the reason I have already stated.

The third fund was a sum of 200*l.*, secured by a bond, which was paid off to the testatrix and received by her and not reinvested. This also, therefore, was adeemed.

The fourth fund was 938*l.* 9*s.* 2*d.*, secured on the mortgage of a mill called *Sapey Mill*, and 700*l.* secured on lands called *Barley*, both belonging to a person of the name of *John Bowbony*; both these sums now remain due on the original securities, and both therefore are available for the payment of the legacies to which they are specifically appropriated.

The

The fifth and last fund is a sum of 2,000*l.* £3: 10*s.* per Cent. Reduced Annuities. There was no dealing with the fund, other than that, after the death of *Benjamin Crane*, it was by the trustees transferred into the name of the testatrix, in whose name it now remains. This, in my opinion, is no ademption, and this sum is specifically applicable to the payment of the debt.

The only remaining question which arises on this will relates to five legacies which are given thus:—"And whereas on" &c. [see *ante*, p. 33.] I think that all the legacies are payable. The argument against them is, that the will simply contains a direction or request to *Benjamin Crane* to pay these legacies, and that being such, they are not legacies of hers but a request to him to give legacies, which has no operation. I think that the words of the will do not support that argument. They constitute, I think, five legacies given by her, with a request that they should be paid by *Benjamin Crane* out of a particular fund. They are in the nature of demonstrative legacies, that is, general legacies directed to be paid out of a particular fund. Observe the words "Whereas *Benjamin Crane* is entitled to some personal estate, and whereas *I am desirous of leaving* certain legacies payable on my decease: I therefore request him to pay the following legacies, viz.," then follows an enumeration of five legacies. Omit the introductory words and there could be no question but that the five legacies were legacies given by the testatrix, all that she does is, that before giving them she mentions a source from whence they are to be paid. If *Benjamin Crane* had survived her, that might have raised a question of election, but it could not have disappointed the legatees. Assume that the fund which she appropriates for the payment of these legacies fail, the legacies are not also to fail. Suppose she had said I

give

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give the following legacies to *A. B. &c.*, and I request that these legacies be paid to my executor out of a sum of stock standing in my name," using the words "out of," not by giving a part of the stock itself for payment of the legatees; then the effect would have been, that they would have been general legacies to be paid out of a specified fund, but if that fund failed the legacies must be paid out of the general personal estate. Here I think the words "I am desirous of leaving certain legacies," followed by the statement of them, the last three of which are to be paid six months after her decease, point at this:—that these were general legacies given by the testatrix, and that the previous words shew, that these legacies were coupled with a request to her husband to pay them out of a fund which she supposed belonged to him, and which request, whether complied with or not, does not affect the validity of the bequest.

I have now, I believe, disposed of all the questions submitted to me on this certificate, and the order on further consideration may be made accordingly.

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1862.

Dec. 18.

1863.

Jan. 14.

## HOGG v. JONES.

THE testator, the Reverend *William Maxwell*, by his will, dated in 1818, devised his freehold estates to trustees and their heirs, to the use and intent that his son, *John Maxwell* (a lunatic) should receive an annuity of 1,000*l.* a year, and the residue of the rents were to accumulate. And subject thereto, the trustees were to stand seised of all his freehold estate to the use of the first and other sons of his son *John Maxwell* in tail, and in default, to the use of the testator's daughter *Anne Lyte* for life, with remainder to trustees to preserve, with remainder to the first son of *Anne Lyte* in tail male, with remainder to her daughters, &c., &c.

And he declared, that he had devised his estates to trustees, in order that the legal estate might be vested in them to support contingent remainders, "it being his intent and meaning, that no person should, under the limitations and trusts aforesaid, become entitled to the same lands in possession, or to the rents and profits thereof, during such time as any antecedent limitations remained in contingency and capable of taking effect, (that is to say), whilst there was any possibility, in the eye of the law, of any other persons or person coming in esse, or who, if then in esse, would take a prior estate in the same lands, hereditaments and premises, under the trusts and limitations thereinbefore expressed or contained."

He died without having been married. At *A.*'s death, *C.* was the issue in tail of *B.*, but was not in possession of the freehold. Held, that there had been no failure of the gift of the plate, and that *C.*, and not the representatives of *B.*, were entitled to it.

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He bequeathed his personal estate to trustees upon the following trust :—as to my plate, I give the use and enjoyment thereof to my said wife during her natural life only, and after her decease, I give the same, in the nature of an heirloom, *to the person who, for the time being, shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will.* And the testator directed and declared, that if any species of his personal property should remain, after the several dispositions which he had thereinbefore made, or if there should be anything which might have escaped his attention, and which he might not have thereinbefore sufficiently disposed of, the same should go and belong to his said wife *Jane Maxwell*, her executors, administrators and assigns, as his residuary legatee and legatees thereby appointed, absolutely for ever.

The testator died in 1818.

*Anne Lyte* had an eldest son, *Henry William Maxwell Lyte* the first tenant in tail *in esse*, and other children, subject, of course, to the possibility of his uncle, *John Maxwell*, recovering his sanity and leaving issue male, which would have deprived him of his right to the real estate.

On the 29th of December, 1844, *Anne Lyte*, the tenant for life in remainder, on failure of the issue male of her brother (the son of the testator), together with her son *Henry W. M. Lyte*, the tenant in tail in remainder after the determination of the estate for life of his mother, joined together and executed a disentailing deed, and, as far as they were able, destroyed the limitations contained in the will of the testator relating to real

real estate dependent on the death of the son *John Maxwell* without issue.

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*Anne Lyte* died in January, 1856. *Henry W. M. Lyte*, her eldest son, survived her and died in June following (1856). He left the Defendant, *Edward Maxwell Lyte*, his eldest son and heir in tail, and by his will he devised and bequeathed his real and personal estate to some of the Defendants upon certain trusts, so that *Edward M. Lyte* was not in "actual possession or enjoyment" of the testator's freeholds.

*John Maxwell*, the son, died in 1861 without ever having been married, and the question then arose as to whom the plate belonged? It was claimed, first, by the legal personal representatives of *Henry W. M. Lyte* as the first tenant in tail; secondly, by *Edward M. Lyte* as the first existing equitable tenant in tail under the testator's will, if such entail had not been barred; and thirdly, by the executors of the widow as undisposed of and as part of the testator's residue.

*Mr. Selwyn* and *Mr. W. T. Bovill*, for the Plaintiffs, the trustees of the testator's will, stated that the questions were, first, as to the effect of the disentailing deed, whether there was any and what protector, and as to the effect and extent of the deed. Secondly, to whom the plate left as heirloom now belonged?

*Mr. Baggallay* and *Mr. Lewis*, for the representatives of *Henry W. M. Lyte*, claimed the heirloom as part of the estate. They argued that they vested in him absolutely as heirlooms, he being the first tenant in tail; *Lord Scarsdale v. Curzon (a)*.

Mr.

(a) 1 John. &amp; H. 40.

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Mr. *Lloyd* and Mr. *Jenkinson* for trustees of a settlement.

Mr. *Macnaghten* for the representative of the testator's widow. The plate is undisposed of; for the person who is entitled is he who is "in the actual possession and enjoyment under the will." No person has ever or ever can fill that character, for the estate is now held independently of the will and under the limitations of the disentailing deed. *Henry* was never in possession and *Edward* can never be in possession under the will. *Henry Lyte* destroyed all the limitations in the will subsequent to the life interest of his mother, and this prevented him and all others from ever filling that character which alone would entitle them to the plate. The gift is not in the nature of an executory trust and it cannot be modified. He cited *Lord Scarsdale v. Curzon* (a); *Vaughan v. Burslem* (b); *Ellis v. Maxwell* (c).

Mr. *Druce* for *Edward Lyte*. First. The disentailing deed might be set aside by the issue in tail. Secondly. *Edward Lyte* is entitled to the plate as *persona designata*. It is given to him individually and absolutely, not under a limitation to go in conformity with the real estate, but to the persons in actual possession and enjoyment under the will. The imperfect barring of the entail does not affect the right to the chattels, nor can any subsequent dealing with the estate alter the character of the person pointed out by the testator's will. Actual corporeal enjoyment could not be what the testator intended, for then the plate would belong to any stranger who might purchase the estate. The disentailing deed affected

(a) 1 *John & H.* 40.  
(b) 3 *Bro. C. C.* 101.

(c) 3 *Beav.* 587, and 12 *Beav.*  
104.

affected the realty alone, and could not alter the rights to, or the devolution of, the personality; *Re Tates' Trust* (*a*); *Potts v. Potts* (*b*).

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Mr. Osborne and Mr. G. L. Russell, for other trustees, cited *Gosling v. Gosling* (*c*).

Mr. Baggallay in reply. The object was that the plate should go along with the estate, and the word "heirlooms" imported succession. H. W. M. Lyte's right is quite irrespective of the disentailing deed; *Foley v. Burnell* (*d*).

The Master of the Rolls.

The question on which I reserved my judgment is the determination of the person to whom certain chattels belong under the words of the will of Dr. Maxwell and the events which have since occurred.

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The testator gave the plate "to the person who, for the time being, should be in the actual possession and enjoyment of his (the testator's) freehold estates under the limitations of his will."

Now, under the prior limitations of his freeholds, no one could be "in the actual possession and enjoyment of the testator's freehold estates" during the life of the testator's son John Maxwell, who was a person of unsound mind, and who died on the 29th of November, 1861.

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| (<i>a</i>) Unreported. Vice-Chanceller Wood, June, 1862. | 1 H. of L. Cas. 671. |
| (<i>b</i>) 3 Jones & L. 353, and | (<i>c</i>) John. 265. |
| | (<i>d</i>) 1 Bro. C. C. 274. |

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The claimants to the plate are three, first, the representatives of *H. W. M. Lyte*, who executed the disentailing deed; secondly, *E. M. Lyte* his son, who would be now entitled to the actual possession and enjoyment of the estate of the original testator, in case no such disentailing deed as I have mentioned had been executed; and thirdly, the representatives of the widow of the original testator.

For the first claimants, the representatives of *H. W. Lyte*, it is contended, that under the word "heirlooms" these chattels vested absolutely in the person who was the first tenant in tail, and that thereupon they become a portion of his property and passed as such to his representatives.

For the second, the Defendant *E. W. Lyte*, it is contended, that the effect of the will is, to vest the chattels in the person who in the events would, if no disentailing deed had been executed, have been the first person in the actual possession and enjoyment of the rents of the real estate; that such legatee is a designated person, and that the circumstance, that a disentailing deed has been interposed and prevented the enjoyment of the estate, cannot affect the devolution of the chattels, which cannot be the subject of any such deed.

For the third, the representatives of the widow, it is contended, that the words of the will are precise, that the chattels are given, after the decease of the widow, to a person "*who shall be in the actual possession and enjoyment of the freehold estates under the limitations contained in the will.*" That this imposes on the legatee as a condition precedent, not merely that the legatee shall be a person in the actual possession and enjoyment of the freehold estates, but also that he shall be in such enjoyment by

by virtue of the limitations contained in the will. That the representatives of *H. W. M. Lyte* are, it is true, in the actual possession and enjoyment of the estate, but not by virtue of the limitations contained in the will, but under the disentailing deed and will of *H. W. M. Lyte*, that therefore they do not fulfil the condition any more than a mere stranger to whom they might have sold the estate, and that they, therefore, are excluded from the legacy. That in like manner *E. M. Lyte* cannot take the legacy, for that he does not fulfil the first part of the condition, viz. that of being in the actual enjoyment and possession of such rents, and that consequently, no one can take these chattels under the words of the bequest. If this be so, then it follows, as a matter of course, that they fall into the residue as undisposed of, and as such must go to the widow, the residuary legatee, and ought now to be delivered to her legal personal representatives.

Of the numerous cases which are usually cited on the subject of these gifts of chattels, which are of frequent occurrence, and which, whenever they occur, usually give rise to suits in equity, I do not think that any one exactly governs this case. *Foley v. Burnell* (a) and *Vaughan v. Burslem* (b) were principally relied upon for the representatives of *W. H. M. Lyte*, but, for the reasons I am about to mention, I think that they do not apply. These cases determined that where an estate was limited to one for life, with remainder to his first and other sons in tail male, and in addition chattels were bequeathed to go as heirlooms in conjunction with the real estate, as nearly as the rules of law and equity will permit, the chattels, in that event, vest absolutely in the tenant in tail in remainder as soon

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(a) 1 Bro. C. C. 274.

(b) 3 Bro. C. C. 101.

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as he is born; and it is argued that such is the case here, that *W. H. M. Lyte* filled that character, and that consequently the chattels vested in him.

But there is an obvious distinction between those cases and the present. If those cases apply, it necessarily follows that the chattels vested absolutely in *H. W. M. Lyte* immediately on his birth, and that if he had died on the following day, still they would have passed to his legal personal representatives. But on this will I think that it is impossible so to hold; it is true that his interest in the freeholds was a vested interest, but still it was an interest liable to be divested; it was an interest dependent on the circumstance of *John Maxwell* the son of the testator dying without leaving a son. In *Foley v. Burnell* and *Vaughan v. Burslem* the son had an indefeasible interest as tenant in tail. If he lived long enough, no circumstance could have prevented his becoming absolutely entitled to the possession and enjoyment of the devised real estate; that is not so here. If I were to hold that the chattels vested absolutely in *H. W. M. Lyte*, this result would follow:—that if a testator, having five or six sons, were to devise the estate to each in succession for his life with remainder, on the death of each, to his first and other sons in tail male, that is, to *A.* the first son for life, with remainder to his first and other sons in tail male, and for default of such issue to *B.* the second son for life, with remainder to his first and other sons in tail male, and so on, and if chattels were limited to go with the real estate as heirlooms, then the first grandson of the testator born would take the chattels. The birth of a son to *B.* or to any one of the younger sons, two or three months before the birth of a son to *A.*, the eldest, would deprive *A.*'s son of the whole of the interest in the chattels which were limited to go with the estate. This certainly is not decided by

Foley

Foley v. Burnell or *Vaughan v. Burslem*, nor are any words to be found in those decisions, as it appears to me, from which any such conclusion or any thing approaching to such a conclusion can be formed. It would also appear to me to be a very strained and technical construction, and one leading to a result which would obviously defeat the intention expressed by the testator.

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My opinion is, that all that is decided by these cases, if applied to the limitations and bequest contained in this will, is, that these chattels would have vested in a son of *John Maxwell*, had any one been born to him at any time before his death, and that they would have vested in such son on his birth, but it does not decide that while that event was doubtful, and while, in the meantime, no one was in the possession or enjoyment of the rents under the limitations contained in Dr. *Maxwell's* will, these chattels would vest absolutely in anyone.

If this be so, these cases have no application, and as the tenancy in tail in *H. W. M. Lyte* was defeasible during the whole period of his life, I am of opinion that he took no interest in the chattels bequeathed, and that no one claiming under him can support any claim to them for that purpose.

I now come to consider the case of *E. M. Lyte*, and first I look at how his claim would have stood if no disentailing deed had been executed. In that case I think it clear that *E. M. Lyte* would have been entitled to these chattels absolutely. Immediately on the death of *John Maxwell* the son, *E. M. Lyte* would, but for this disentailing deed, have become indefeasibly tenant in tail in the actual possession and enjoyment of the real estate. I am at a loss to perceive what sound argument

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argument could have been alleged to deprive him of the right to these chattels. It is the plain meaning of the words used by the testator, he would have fulfilled the words of the description of the legatee contained in the will with perfect accuracy, he would have been the first person "in actual possession and enjoyment of the freehold estates under the limitations of the will." If the chattels had been given, or if the Court finds the words of a will to import a gift of them, to the first person who had a vested indefeasible estate of inheritance in the real estate, he was the first person who had such estate, and if the matter then stood between the representatives of *H. W. M. Lyte* and his son *E. M. Lyte*, I should have no hesitation in determining the son to be entitled to the plate.

I have next to consider whether the disentailing deed executed by his father and grandmother has deprived him of the right to such chattels. This deed could only operate to create a base fee in the property in remainder in *H. W. M. Lyte*. If it did, which I assume to be the case, then, if I am right in the construction I have placed on the decisions of *Foley v. Burnell* and *Vaughan v. Burslem*, the only question that can arise is between the residuary legatee and *E. M. Lyte* as to their respective rights. For the residuary legatee it is contended, that the words "actual possession and enjoyment of the freehold estates" import, as a condition precedent, that the legatee should be in the physical perception of the rents and profits arising from the devised estates; but this is not my opinion. I think that the words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, *E. M. Lyte* is clearly the person entitled to the plate. He is the person who, under the limitations contained in the will (regarding them, and them alone,

alone, undisturbed by any foreign cause) is entitled to such possession and enjoyment, and which he would have obtained unless these limitations had been defeated by a foreign circumstance over which neither the testator nor the legatee had any control. It is plain, as was well put by Mr. *Druce*, that the disentailing deed, which has no operation over chattels, could not in any degree affect the devolution of them; they must go exactly as if such deed had never been executed; but the effect of the contention of the residuary legatee is, to hold that a disentailing deed operated so as to create an intestacy in this disposition of the chattels against the will of the testator.

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The consideration of the cases of *Potts v. Potts* (*a*) and of *Lord Scarsdale v. Curzon* (*b*), before the Vice-Chancellor Sir W. P. Wood, confirms me in the view I take; I do not think that the Vice-Chancellor, in that case, intended to draw or establish any distinction between the right to the enjoyment of the estate under the limitations of the will when united to the actual enjoyment of it, and the mere right to such enjoyment when not coupled with the actual possession, where the failure of the actual possession was occasioned by reason of some foreign disturbing causes having destroyed the further operation of the limitations upon the estate devised. Whether such failure be occasioned by a disentailing deed or by natural causes cannot, I think, make any difference. In both cases the right would exist under the limitations of the will taken alone, but in neither case could that right be enforced.

I think that my meaning may be illustrated by suggesting such a case as this:—suppose that the chattels had

(*a*) 9 *Irish Equity Rep.* 577,      (*b*) 1 *John. & H.* 40.  
and 1 *H. of L. Cas.* 671.

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had been given in the words of this will, and that the real estate, in the actual possession and enjoyment of which the legatee was to be, had been a small messuage on the east coast of *England*, and that, during the life of *John Maxwell*, the house and ground had been swept away by some inroad of the sea, so as to render it impossible, after that calamity, for anyone to be in the "actual possession and enjoyment" of it: could it be contended that such an event created an intestacy in the bequest of the testator? I think it would be impossible so to hold. But if this be so, and if, in such an event, *E. M. Lyte* would have been entitled to these chattels; how does the case differ, because the act which prevents such enjoyment is the act of man instead of being the act of God? The rights under the will remain the same, the meaning expressed by the will is obvious; the testator, in the events which have occurred, has expressed his intention, in plain words, that *E. M. Lyte* should take the estate and the plate. A disentailing deed, which the testator could not prevent, has enabled two persons, now deceased, to defeat this intention, as far as regards the estate; the intention of the testator, as regards the plate, could not be defeated by them, no deed would affect it; then why is that intention not to take effect?

I am of opinion that no valid reason can be assigned against that proposition and in every way of viewing this case, and I am of opinion that *E. M. Lyte* is entitled to the plate bequeathed.

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***Re THE ROTHERHITHE, &c. INDUSTRIAL SOCIETY.***

*Nov. 12.*

THIS society had been registered under the Provident Societies Act of 1852 (15 & 16 Vict. c. 31), but not under the Act of 1862 (25 & 26 Vict. c. 87). By the 17th section of the latter act, societies "registered under this act" are to be wound up in the County Court. A provident society, registered under the Act of 1852, is to be wound up in the County Court.

This Court had, inadvertently, made an order to wind up the above society in this Court, under "The Companies Act, 1862" (25 & 26 Vict. c. 89).

But the provisions of the second act having, in another case, been brought to the attention of the Master of the Rolls in Chambers, he stayed the order.

Mr. *Fischer* mentioned the matter to the Court, and stated that the Judge of the County Court considered he had no jurisdiction, the society not being registered under the Provident Societies Act, 25 & 26 Vict. c. 87, s. 2.

***The MASTER of the ROLLS.***

I still think that this society ought to be wound up in the County Court, and you must either mention the matter to the Lord Chancellor, or register the society under the Provident Societies Act, 1862.

Mr. *Fischer* elected to adopt the latter course.

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## GOSLING v. GOSLING.

*June 4, 11.*  
 A testator devised real estates to trustees, to the use of A. for life, with remainder to his first and other sons successively in tail, with remainder to B. for life, with remainder to his first and other sons in tail, &c. And he bequeathed his personal estate to the same trustees, &c., "or as near thereto as the rules of law and equity would admit." Provided nevertheless, that the personal estate should not "rest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years." It was by the Master of the Rolls, that the gift of the personally was to be made, but the limitation of twenty-one years, that the personal estate might apply to tenants in tail taking by purchase.

THE testator, *Bennett Gosling*, a banker, made his will in 1844, by which he directed that the right to succeed him as a partner in the bank should be offered first to *Ellis Gosling*, the second son of his brother *Robert Gosling*, and in case he should refuse or neglect to accept such offer, that the like offer should be made in succession to the third and every other younger son of *Robert Gosling*.

And he bequeathed 50,000*l.* to trustees, to be laid out in the purchase of an estate in fee simple, which he directed to be conveyed to his trustees until some one of them, the said second and younger sons of *Robert Gosling*, having had the offer made to him, should accept the same, or until the period within which the last of such offers might be accepted should have expired. And from and immediately after either of such events should have happened, then, in case any of them, the said second or other younger sons of *Robert Gosling*, should accept the said offer, to the use of the son so accepting and his assigns, for and during his life, without impeachment for waste, with remainder to the use of his first and other sons successively in tail male, with remainder over to the other sons of *Robert* for life, with remainder to their first and other sons in tail. And the testator directed his trustees to receive and invest the rents of the estate, so to be purchased, until the date of the happening of the events above referred to, and to add such

such accumulated rents to his residuary personal estate. The will proceeded as follows:—

I give and bequeath unto my said trustees "all my real estate and all the residue of my personal estate, upon trust to sell my chambers in *Lincoln's Inn*, and to get in and convert into money all my said residuary personal estate, and to invest the moneys to arise from my said chambers and residuary personal estate, in their or his names or name, in the parliamentary stocks or public funds of *Great Britain*, or at interest on government or real securities in *England*, and to stand possessed of all such investments and personal estate, and also to stand seised of all such real estate, to such uses, upon such trusts, and for such estates and interests, and with, under and subject to such powers and provisions as hereby are declared concerning the lands and hereditaments hereinbefore directed to be purchased, or as near thereto as the rules of law and equity will admit. *Provided nevertheless, and I hereby declare that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years.*"

The testator made a codicil to his will, by which, after reciting that he had purchased an estate called *Busbridge Hall*, he revoked the bequest of 50,000*l.* to his trustees, and in lieu, devised the *Busbridge Hall* estate to them, upon the several uses, trusts &c. mentioned in his will as to the estate to be purchased with the 50,000*l.*

The testator died in *May*, 1855. His only real estate besides *Busbridge Hall* consisted of the chambers.

*Ellis Gosling attained twenty-one in January, 1857,*  
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and, by a notice in writing, duly accepted the offer contained in the will of the testator, and became tenant for life of the estate and the personality. He died in July, 1861.

The Plaintiff, *Ellis Duncombe Gosling* his only son, was born a few weeks after his father's death, and was the first tenant in tail. As such, he, by this bill, claimed an absolute interest in the residuary personal estate, subject to the proviso that the same should not vest in him absolutely unless he should attain twenty-one. The question had been argued before Vice-Chancellor *Wood* (*a*), in 1859, but he considered it premature to decide it.

The Solicitor General (Sir *R. Palmer*) and Mr. *Osborne* for the Plaintiff. The Plaintiff is the tenant in tail of the real estate, and the personal estate is given to him in terms of reference, so that the chattels vest in him absolutely as the first tenant in tail; *Vaughan v. Burslem* (*b*); *Lord Scarsdale v. Curzon* (*c*).

The bequest of the personality is perfectly valid. First, the words "vest absolutely" mean a vesting indefeasibly (*d*). Secondly, the proviso is in a separate and distinct sentence; the gift is in positive words, and is attempted to be cut down by subsequent negative words; if the latter be void, the original absolute gift remains unaffected. There is a long class of cases which determine that a valid absolute gift remains, so far as it is not effectually cut down by subsequent words. This proviso is either void or valid; if void, it has no effect, but if valid, it merely makes the vested gift defeasible on the death of the Plaintiff during his minority, in which case the

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(*a*) *Gosling v. Gosling*, 1 *John.* 265. (*c*) 1 *John. & Hen.* 63, 65.  
 (*b*) 3 *Bre. C. C.* 101. (*d*) *Taylor v. Frobisher*, 5 *De G. & Sm.* 191.

*corpus* would go over, but, in the meantime and until the happening of the event which is to defeat his vested interest, all the intermediate income will belong to the Plaintiff and be available for his maintenance. Thirdly, the personality is given to trustees on trusts which are executory, and the Court will so model the limitations as to make them, so far as possible, effectual. Fourthly, the condition is a condition subsequent, which, if invalid, may be disregarded; *Egerton v. Lord Brownlow* (*a*). The proviso is only applicable to the sons of a tenant for life, and therefore is not void as tending to a perpetuity; *Gower v. Grosvenor* (*b*). But if it be applicable to all tenants in tail, it would simply shew that the proviso is wholly void; *Ware v. Polhill* (*c*). We ask a declaration of the Plaintiff's title and an order for maintenance.

Mr. *Selwyn* and Mr. *Rasch* for the trustees of the will.

Mr. *Rawlinson* for other Defendants.

Mr. *Follett* and Mr. *C. Hall* for some of the next of kin. The gift of the personal estate after the tenancy for life is absolutely void, it is an attempt to limit personal estate to the first unborn tenant in tail, however remote, who may attain twenty-one. It may be centuries before a tenant in tail attains twenty-one. The age is part of the description of the person to take, and no one can become owner of the personal estate until he has attained twenty-one.

If the words "by purchase" had been inserted, we admit the disposition would be valid, as pointed out distinctly

(*a*) 4 *H. of L. Cas.* 1.  
(*b*) 5 *Madd.* 337.

(*c*) 11 *Ves.* 257.

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tinctly by Mr. *Jarman*. He says (*a*) "Again, where fee simple lands are limited in strict settlement, and leasehold or other personal property is vested in trustees upon trust to go along with the fee simple lands, but so as not to vest in any tenant in tail till he shall attain the age of twenty-one years; this trust, so far as it is limited in favor of tenants in tail, is void, since, by the death of successive tenants in tail under age and leaving issue, the vesting of the leaseholds might be deferred beyond the period allowed by law. Care should therefore be taken that the vesting is only deferred till some tenant in tail, *by purchase*, attains the age of twenty-one years."

Limitations must be valid from their inception, no subsequent events can render them valid. This rule of law is accurately laid down by Mr. Justice *Cresswell* in *Lord Dungannon v. Smith* (*b*). He says "It is a general rule, too plainly established to be controverted, that an executory devise to be valid must be so framed, that the estate devised must vest, if at all, within a life or lives in being and twenty-one years after. It is not sufficient that it may vest within that period, it must be good in its creation, and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years and the period allowed for gestation, it is not valid and subsequent events cannot make it so."

The case cited of *Taylor v. Frobisher* (*c*) has no application; *Re Thatcher's Trust* (*d*). No doubt the very object of the clause was, that the personal estate should not vest.

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(*a*) *Jarman on Wills*, vol. 1,  
p. 220 (2nd edit.); *Ibid.*, vol. 2,  
p. 492.

(*b*) 12 *Clark & Fin.* 562.  
(*c*) 5 *De Gex & Sm.* 191.  
(*d*) 26 *Beav.* 365.

It is said that the proviso is distinct from the gift, and then that it must be rejected. But neither of these is correct: the proviso forms part of the gift and of the description of the person to take, who is the first tenant in tail who attains twenty-one. Nor can it be rejected; suppose it were a gift to *A. B.*, provided he attain twenty-one, how could the Court reject the proviso? It is a gift to a person filling that particular character or to no one, and a gift with a qualification is a limited gift which cannot be altered by the Court. This is not a condition at all, but a gift to one filling a certain character.

It is also clear that this is not an executory trust, there is nothing executory as to the realty, and the trusts of the personality are fully declared, leaving no further deed or instrument necessary or proper; *Rowland v. Morgan* (*a*). They also referred to *Saunders v. Vautier* (*b*); *Catlin v. Brown* (*c*); *Russell v. Buchanan* (*d*).

The *Solicitor-General* in reply.

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#### *The Master of the Rolls.*

This question arises on the will of *Bennett Gosling* who died in *May, 1855*. The scope of the will is this:— the testator directed an estate to be purchased and held in trust, in the events which happened, for *Ellis Gosling* his nephew for life, with remainder to his first and second sons in tail male, with remainders over. Then the will contained this clause and proviso:—"Provided nevertheless and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part

(*a*) 2 *Phill.* 764.

(*b*) *Craig & Ph.* 240.

(*c*) 11 *Hare*, 372.

(*d*) 7 *Sim.* 628.

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part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years."

I have to consider whether the proviso is part of the trust, and indeed I think the decision mainly depends upon the answer to be given to this question. I regret to say that I have come to the conclusion that it forms an integral portion of the trusts declared, and not a separate and distinct proviso or qualification, which can be regarded in the same manner as if it had been omitted here, and had been added by a subsequent codicil.

It was argued, on the part of the Plaintiff, that even if the proviso be read as part of the trust, the whole of these trusts are executory, and that the Court will so mould them as to execute the intentions of the testator, as far as may be possible. But I think that the bequest is not executory, it is simply the declaration of trusts of the personal estate, subject to which it is to be held by the trustees, and if so, and assuming the proviso to be incorporated with and to form part of the trusts declared, and subject to which it is to be held, it is difficult to see how the Court can extract this portion of the trusts from the remainder in order to make the remainder good.

This may be tried by writing out these trusts at length, in which case, the personality is given to be held in trust for the nephew, *Ellis Gosling*, for life, and after his death for his eldest son, grandson or great grandson, and so on to the person who shall first attain the age of twenty-one years, then, and not before, it is to become vested in such eldest son, grandson or great grandson. Such a trust would be bad, unless limited to take effect

effect within twenty-one years of the death of some person living at the death of the testator. And if so, the Court could not execute it in favor of the eldest son of the nephew, although he attained twenty-one within the requisite time, no rule being better settled than this :—that a gift originally void cannot be rendered valid by subsequent events.

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It is argued, on behalf of the Plaintiff, that the proviso presents this dilemma, either it is good or not good ; that if it is good, the Court will give effect to it, and that if it is not good, it will have no operation, and the Court will simply disregard it, so that, in either event, the rest of the bequest will take effect.

This argument would be sound, provided the proviso could be separated from the body of the bequest and made perfectly distinct. If, for instance, as I have already suggested, the will had omitted the proviso altogether, and the testator had, by a subsequent codicil, after reciting the devise, stated that he revoked the trusts and substituted new ones, including the qualification to be introduced by this proviso, the Court might possibly have rejected the qualifying proviso which would have the effect of defeating the testator's previous disposition of the personality and leave the will as it stood originally. But if, as the trusts stand in the will, the proviso forms an integral and essential part of the trusts on which the bequest is made, then the Court is not at liberty to extract and reject the portion it considers to be void, otherwise this argument would apply to every case, including *Leake v. Robinson* (a). A gift to the class of unborn children at twenty-five is void, but, by this process, the Court might disregard the words "at twenty-five years of age" and give effect to the

bequest

(a) 2 *Mer.* 363.

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bequest to the children, simply on the death of the tenant for life. Here, if the will be, that the property is to be held in trust for the person who shall fill the double character of being the first tenant in tail of the devised estates and also of having attained the age of twenty-one, the Court cannot restrict the gift, so as to exclude all persons who may become tenants in tail by inheritance of the devised estate, assuming that one of them is also the first to attain the age of twenty-one years, and vest the property in the first tenant in tail who would become entitled if such a proviso had been omitted.

There is no question but that the decision to which I find myself compelled to come will defeat the intention of the testator, and I have striven to reconcile the settled rules of construction with what is the obvious intention of the testator, but I have been unable to do so. I have not found any principle on which I could separate the proviso from the rest of the bequest and treat it as forming no portion of it. The words "provided always" are, in truth, no different from "in such a manner as" or "so as;" they are all connecting words, which unite the sentences and make it form part of the previous bequest. The personal estate is given, as far as the rules of law and equity will permit, coupled with this qualification:—that the absolute interest in the personality is not to vest, absolutely, in the person who is the tenant in tail of the devised estates, unless and until that tenant in tail attains twenty-one years of age. This is what the law does not allow, and the testator has attempted to dispose of his personality coupled with restrictions which are inadmissible at law, and render it void.

If I could make the bequest executory, the Court would,

would, no doubt, give effect to it as far as it possibly could ; but I can see nothing executory in the bequest ; the personality is given to certain persons, to hold in trust, it is not given to them on trust to settle or to convey to persons on trusts to be as near to the trusts of the devised estates as the rules of law and equity will admit.

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Neither can I make the case of *Taylor v. Frobisher*(a) apply, for if the proviso form part of the trust, there is no previous vesting of the property in the person who becomes tenant in tail of the devised estates, so as to enable the Court to separate this proviso from the original bequest, and construe it as importing a vesting in possession, or in other words an indefeasible vesting in such legatees.

I think that the true construction is, that the tenant in tail is not to take the personality until he attains twenty-one, and it is expressly pointed out, that this restriction is not confined to one, but that it extends to all the tenants in tail.

It is argued, that a distinction may be founded on the circumstance that the disposing words are affirmative, while the words of the proviso are negative. But I think that this does not alter the case, and that the effect of the proviso is, to import into the affirmative disposition of the personality a condition, which the person who becomes tenant in tail of the devised estates must fulfil before he becomes entitled to the bequest.

If, no doubt, as was suggested in argument, this proviso could be treated as a condition subsequent, then

(a) 5 *De Gex & Sm.* 191.

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then the gift would take effect at once, and the attainment of twenty-one years afterwards would only be essential for the purpose of giving the first tenant in tail, by purchase, the full enjoyment of the property; and it is obvious that this construction is favored by the circumstance, that the will contains no disposition of the income of the personality in the meantime, such as a trust to invest and accumulate. The case of *Egerton v. Brownlow* (a) was relied on as an authority to support this view of the case; but I think that *Egerton v. Brownlow* does not apply to this particular bequest; neither do I think that the omission of any clause to invest and accumulate the intermediate interest of the personal estate can alter the plain words of the bequest itself, and I think that I should be altering these words and introducing words not used by the testator, and thereby changing the obvious meaning of the passage and bequest, as it stands, if I were so to hold. The attainment of twenty-one years was just as much a condition precedent as the filling the character of tenant in tail of the devised estates; and if I could dispense with the one, I might with the other, and thus make a wholly new will for the testator.

This will, in my opinion, requires that the person who is to take the personality, absolutely, must previously fulfil both conditions. Before this event is accomplished, it may be necessary to wait for many generations. The present Plaintiff may die under the age of twenty-one years leaving a son, who may do the like, and so the personality may remain in abeyance for a time far exceeding legal limits. The unfortunate result of this has been, that either from the desire of the testator to accomplish what the law does not allow, or  
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(a) 4 H. of L. Cas. 1.

by a slip of his legal advisers, his will is disappointed and the bequest of the personality, after the death of the nephew, is void, and is not disposed of by the will.

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NOTE.—The case was heard in November, 1863, upon appeal, before Lord Westbury, L. C., who held the gift valid. 1 *De Gex, J. & Smith*, 1.

## DALLY v. WORHAM.

Feb. 17.

SEVEN exceptions were taken to the sufficiency of the Defendant's answer, of which two were allowed and five were overruled. On the question of costs,

Costs of exceptions allowed, and of those disallowed apportioned and set-off.

The MASTER of the ROLLS said, the Plaintiff must pay five-sevenths and the Defendant two-sevenths of the costs and let them be set off.

Mr. Roberts for the Plaintiff.

Mr. Southgate and Mr. Babington for the Defendants.

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CADDICK *v.* COOK.*Feb. 24, 26.*

A decree for foreclosure or for sale cannot be made in the absence abroad of a party entitled to one-third of the equity of redemption. The objection is not removed by the 15 & 16 Vict. c. 86.

**I**N 1842 *Richard Cook* mortgaged some property in fee to the Plaintiff *Caddick*.

In 1853 *Richard Cook* died, having devised the mortgaged estate to trustees, upon trust to sell and divide the produce between his three children, *Emma*, *Eleanor* and *Henry*, equally. This bill was filed against two of the children (*Eleanor* and *Henry*) and against *Aukrett*, the surviving trustee, and *Emma*. As to the two latter, the bill stated that some years ago they went to reside in *Australia* and that they had not since been heard of. They were stated by the bill to be both out of the jurisdiction, and they had neither of them been served with the bill nor had they appeared. The bill prayed a sale and payment of the mortgage or for a foreclosure.

The case having been brought on for hearing,

Mr. *E. K. Karslake*, for the Plaintiff, asked for a sale of the estate and for the application of the produce in payment of the mortgage.

Mr. *Phear contrà*, for the Defendants, insisted that no decree could be made, in the absence of a party interested in one-third of the equity of redemption. That a decree for foreclosure could not be made piecemeal, nor could a sale be directed in the absence of any of the parties interested in the estate, as no good title

title could be made to a purchaser. He cited *Browne v. Blunt* (a). *Tanfield v. Irvine* (b) was referred to.

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Mr. *Karslake* in reply. Even under the old practice, when a necessary party was out of the jurisdiction the cause might be heard in his absence; *Rogers v. Linton* (c). But now, by the 15 & 16 Vict. c. 86, s. 51, the Court may adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property, and the 42nd section relieves a Plaintiff from the necessity of making as many parties as formerly. If, however, the Court should think that the share of the absent party could not be affected, the Plaintiff is willing to take a decree for foreclosure limited to two-thirds of the estate.

Mr. *Phear*. That would throw the whole of the mortgage on the two-thirds of my clients.

*The Master of the Rolls.*

I think that this objection must prevail. I cannot make a decree for foreclosure against a person who is not before the Court, if I could make it as to one-third, I might equally make it against a person entitled to two-thirds. It is obvious also that I cannot foreclose an estate piecemeal.

I do not think that the objection is cured by the 42nd section of the 15 & 16 Vict. c. 86, nor by the 9th rule of section 42. I do not think it applies to a case of this description.

(a) 2 *Russ. & Myl.* 83.  
(b) 2 *Russ.* 149.

(c) *Bunb.* 200.

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description. I will allow this cause to stand over generally, with liberty to apply.

Mr. Phear asked for the costs.

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*Feb. 26.*

*The Master of the Rolls.* I must give the Defendant the costs of the day.

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*Note.—See Fell v. Brown, 2 Bro. C. C. 276; Farmer v. Curtis, 2 Sim. 466.*

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### ALDER v. LAWLESS.

*Feb. 19.*

Bequest of an annuity to husband and wife "during their natural lives." The wife pre-deceased the testator. Held, that the husband was entitled to the annuity for his life.

THE testator amongst other bequests made the following:—"I give and bequeath to James Alder and Britannia his wife, both of Wilmot Square, an annuity of 30*l.* during their natural lives."

*Britannia Alder* died in *May, 1860;* the testator survived her and died in *September, 1860.*

By this suit, *James Alder* claimed to be entitled to the annuity of 30*l.* for his life. The executors alleged that it was doubtful whether the annuity did not lapse, by reason of the death of *Britannia Alder* in the testator's lifetime.

Mr. W. Pearson, for the Plaintiff, cited *Neighbour v. Thurlow* (a).

Mr. Jno. Pearson for the executors.

*The Master of the Rolls.* I think it clear that the Plaintiff is entitled.

(a) 28 Beav. 33.

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## BATE v. ROBINS.

Jan. 20, 21.  
Feb. 12.

THE question which arose, in this case, was as to the principle on which the accounts of a partnership ought to be taken, as between the late Defendant Mr. Robins and the estate of his former partner Mr. Bate.

*Thomas Bate*, the testator, and the late Defendant, *W. Robins*, carried on business as bankers, in partnership together, at *Stourbridge*, on terms of equal profit and loss. The accounts of all the customers at the bank were kept at compound interest on both sides, and the amount standing to each partner with the concern was kept, in like manner, at compound interest.

*Thomas Bate* died in *October*, 1846, and the Plaintiffs were his legal personal representatives, his widow and son. At the death of *Thomas Bate*, the amount appearing to his credit in the books of the concern was the sum of 7,189*l. 5s. 3d.* This was arrived at by treating all the accounts of the customers with the bank as good debts, although a large class of debts due to the concern were more or less of a doubtful character. These went by the name of "dead balances," and the extent to which these might fail to be realized would therefore diminish the amount of the balance due to the estate to Mr. Bate.

After Mr. Bate's death, no new account was opened in the bank books, but the balance due to him was continued keeping an account at a banker's at compound interest, will not be allowed the accumulated interest in passing his accounts.

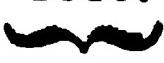
As to the proper mode, in the absence of any agreement expressed or implied, of taking the partnership accounts of bankers, as between a surviving partner and the estate of the deceased partner.

A firm of two bankers were accustomed to keep the accounts, both of the customers and of the partners, at compound interest. One partner died.

Held that, in the absence of any special agreement, it was not proper to continue the accounts as between the surviving partner and the estate of the deceased partner at compound interest.

An executor, who allows his testator's estate to become insolvent, by

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tinued, as if all the outstanding debts were good. The accounts of the representatives of Mr. *Bate* and of the "dead balances" were continued as before at 5*l.* per cent. with annual rests, and the losses from the "dead balances," as from time to time ascertained, were written off as bad debts, and the share of each partner was then debited with one-half of such loss. This mode of keeping the accounts was adopted by Mr. *Ryland* (a clerk) without any authority or agreement on the part of the Plaintiffs. It was, however, known to the Plaintiff, *C. J. Bate* (the son), who continued to be a clerk in the bank after his father's death.

In *May*, 1851, accounts were rendered to the widow, and in *June*, 1851, two meetings took place respecting them [see page 76].

In *August*, 1851, Mr. *Robins* sold his business to the *Birmingham and Midland Banking Company*, and the accounts were afterwards continued by that company. Under these circumstances, the questions were, first, whether the mode adopted for keeping the accounts was the proper one, as between Mr. *Robins* and the estate of Mr. *Bate*, and, secondly, whether there had been any special agreement or binding acquiescence on the part of the Plaintiffs, which justified that mode of keeping the accounts.

The *Solicitor-General* (Sir *R. Palmer*), Mr. *Coleridge* and Mr. *Hallett* for the Plaintiffs.

Mr. *Selwyn*, Sir *H. Cairns* and Mr. *C. Hall* for the Defendant.

The *Solicitor-General* in reply.

*The Master of the Rolls.*

The first question I have to consider is, what is the right mode of taking the accounts between the partnership and the estate of the deceased partner, in the absence of any agreement, expressed or implied, varying the usual mode of taking such accounts. I am of opinion that, independently of any agreement, the proper mode of taking the accounts is, to ascertain the net balance of the assets over the liabilities of the concern, to divide this in equal portions, and to pay to the representatives of the deceased partner one-half of this amount, together with simple interest at 5*l.* per cent. per annum until payment thereof. If the concern be thereupon wound up and the business sold, this is a simple process leading to no complication or difficulty. If the surviving partner carry on the business, then a new element is to be dealt with, which arises from the manner in which the debts due to the concern are to be treated. The surviving partner who continues the concern may, at his option, adopt, as good debts, such of the debts due to the concern as he thinks fit, and those he must treat as assets in his hands, the remaining debts must be got in as speedily as can possibly be effected, and the amount derived from that source must be divided between the estate of the deceased partner and the surviving partner who continues to carry on the business.

I omit all mention of good-will, because no claim is made in that respect in the present case; no value seems to have been attached to it by the representatives of the deceased partner.

If the course of ascertaining the share of the deceased partner, which I have above indicated, be not followed,  
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it must, in order to be binding between the parties, be founded on some agreement entered into between them, either expressed or to be implied from their dealings with each other. In either case, the burthen of proof lies on the person who seeks to enforce and obtain the benefit of such varied mode of taking the accounts.

On examining the evidence, I find no trace of any express agreement, or indeed of any agreement at all. Prior to the month of *June*, 1851, for four years and eight months, there is a complete absence of any agreement which would bind the estate of the testator *Thomas Bate*, nor indeed is any such agreement alleged by the Defendant. What is alleged and to support which evidence is adduced is this :—that regard being had to the peculiar system on which this business was conducted, the mode in which the accounts were actually kept was, as against the estate of *Thomas Bate*, the correct mode of keeping such accounts, and that, whether correct or not, the Plaintiffs were cognizant of the fact and acquiesced in their being so kept.

In order to consider this point, some further reference to the accounts and to the conduct of the parties is necessary. The facts, as they appear to me to be established by the evidence, are as follows :—From the death of Mr. *Thomas Bate*, in *October*, 1846, till 1851, nothing was done towards settling the amount due to his estate. In *April*, 1851, the Plaintiff, Mrs. *Bate*, applied to the late Defendant *Robins* for an account of her husband's interest in the firm, and thereupon Mr. *Perry*, a clerk in the bank, in *May*, 1851, made out four accounts which are proved in the cause. On the 2nd and 5th of *June*, 1851, two meetings took place, at the former of such meetings the Plaintiff *Charles Bate*, Mr. *Oughton* his uncle, Mr. *Corser* the solicitor of Mr. *Robins*,

Robins, and Mr. *Perry* were present, and at the second interview, the same gentlemen were present with the exception of Mr. *Oughton*. In *August*, 1851, Mr. *Robins* sold the whole concern to the *Birmingham and Midland Banking Company*.

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The Plaintiff, *C. J. Bate*, was a clerk in the bank at the time of his father's death in 1846, shortly after which he attained his age of twenty-one years; he continued in the service of the late Defendant *Robins*, in the character of cashier, until the business was disposed of to the *Birmingham and Midland Banking Company* in 1851, after which he acted in the same capacity for the company until the month of *April*, 1853.

No account was opened in the books of the bank on the death of *Thomas Bate* in *October*, 1846, or at any subsequent time, between the late firm of *Bate & Robins* and the continuing business carried on by *Robins* alone; but the balance of *Thomas Bate* was taken at what it would have been, in case all the "dead balances" had been good debts, and interest was calculated at 5*l.* per cent. with yearly rests on such balances, and when the account was closed on any one of such "dead balances," and the securities had been realized, and the deficiency written off as a bad debt, then the share of each partner was debited with one-half of the loss appearing on the books, being the sum between the amount so calculated and the sum actually received. As I have already stated, this was not, in my opinion, in the absence of any agreement or binding acquiescence, the correct mode of keeping such accounts. They were, in fact, kept exactly as if *Thomas Bate* had continued to be a partner in the concern, except that his estate obtained no share of the profits of the continuing business. If the estate of *Thomas Bate* is bound by this

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this mode of keeping the accounts, it must be by reason of what took place at the meeting in *June*, 1851, to which I have referred, or to the acquiescence of the Plaintiffs in such mode of keeping the accounts.

Upon the careful perusal of the evidence relating to what occurred on the two meetings in *June*, and indeed to all the interviews spoken of by Mr. *Cornier*, it appears to me that the mode of keeping the accounts never was the subject of any discussion or agreement; it seems to have been assumed that the mode adopted was the correct mode, and the discussion related to the mode of ascertaining what would be due on that principle, and what was to be done with the various outstanding assets of the old firm, and the mode of realizing several of the "dead balances." It is to be observed, that Mr. *Robins* was not present at any of these meetings, that nothing, except the papers I have mentioned, was put into writing, that nothing was signed, and that the mode of keeping the account was adopted by Mr. *Ryland* (a deceased clerk), because it was considered by him to be correct, but without any authority or agreement to that effect on the part of the Plaintiffs or either of them. There is, in fact, no trace of any agreement binding either Mr. *Robins* or the Plaintiff, and the meeting in *June*, 1851, is wholly inconsistent with the assumption that any such agreement existed.

In the absence of any such agreement, the only question that remains is, how far the Plaintiffs were bound by acquiescence in the mode of taking the accounts. It appears by the books, as made up and ascertained in *June*, 1851, and by the documents proved in the cause, which were made out by Mr. *Perry* and particularly by the document C., that, on the 31st of *December*, 1846, assuming also the "dead balances," which

which amounted at that time to the sum of 61,000*l.* or thereabouts, to be all bad debts, that on that day the net balance due to the estate of Mr. *Thomas Bate* would have been about 2,000*l.*, that is, assuming that the debt set down to *Thomas Hill* of 1,280*l.* was an error, otherwise it would have been about 1,400*l.* The balance placed to the credit of *Thomas Bate's* estate was upwards of 7,000*l.*, and interest has been allowed on this amount at 5*l.* per cent. per annum with yearly rests. The amounts of the "dead balances" were kept in the books with yearly rests, and this was correct, because this was the course of dealing of the bank with their customers: accordingly, as against the debtors on such accounts, that mode of taking their accounts would shew the amounts due from them respectively.

But the manner in which it would operate against the estate of *Thomas Bate*, if the amount not recovered were to be charged against the estate of *Thomas Bate*, though not very obvious at the first sight, would soon be evident and would tell very heavily. For instance, assume that one of these balances was, at the death of *Thomas Bate*, a sum of 10,000*l.*, the security for which, if then realised, would have produced 8,000*l.*; the loss sustained by his estate would, on the mode I have stated that such accounts ought to be taken, be only 1,000*l.*, if sold immediately, and if it did not ultimately produce more when sold, would still only be that same amount. But assume that, in the belief of Mr. *Robins*, it was settled that this security would ultimately produce more than 8,000*l.*, and that therefore the ultimate realization of it was postponed for fourteen or fifteen years, then the nominal amount due on the dead balance might be 20,000*l.*, and if the security were then realized and produced 10,000*l.*, 5,000*l.* would be the loss to fall on the estate of *Thomas Bate*.

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*Bate.* It is in fact a mode of compelling the estate of *Thomas Bate* to adopt half the “dead balance” as if he had been the original debtor to that amount. As long as he lived and carried on the business and participated in the profits, it did not materially affect him; but the moment that, on his death, though the real balance due to his estate is only 2,000*l.*, 7,000*l.* is placed to the credit of it: the effect is this,—the extra 5,000*l.* is in fact a mode of substituting his estate as a security for one-half of the debt; and although it be true, that if the executors of *Thomas Bate* had drawn out nothing from this amount, it would have accumulated at compound interest in like manner, and that thus it would have balanced the “dead balance” set against it, yet its obvious tendency was to mislead the Plaintiffs, who would naturally have supposed that this was the amount or nearly so they might reckon upon, and which they might deal with as the balance due to their estate, unconscious of the fact that a large debt was accumulating against them at compound interest, simply because it was thought expedient to gain more for a security at a future time. If, by their postponement, the value of the security could have accumulated at compound interest, it would not have much mattered to the Plaintiffs, but this course of dealing has no effect, as against the continuing partner, similar to that which it has on the estate of the deceased partner. The survivor has simply to pay with one hand what he received with the other, while to the estate of Mr. *Bate* and to those who are interested under the estate, it amounts to this,—you have a nominal balance of 7,000*l.*, of that you may draw out 2,000*l.*, or if you retain it, it will accumulate at compound interest at 5*l.* per cent. per annum; but if you draw out anything beyond that 2,000*l.*, the sum you so draw out will accumulate against you at compound interest at 5*l.* per cent. per annum; and if you

leave

leave it in, it will simply balance so much of the "dead balances" as are accumulating, nominally, at that amount, as against you.

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In addition to which, it appears by the evidence that this *extra* 5,000*l.* was, in a great measure, nominal, that Mr. *Robins* would not have permitted the Plaintiffs to exhaust the balance put to their credit, and his refusal to do so, beyond what he thought safe for the purpose of meeting the remaining "dead balances," has occasioned this suit.

Not only is this not the mode in which the Court of Chancery takes the accounts of concluded partnerships, but even if an agreement were made for that purpose, it would require that so peculiar a method should be fully and accurately explained to and understood by the representatives of a deceased testator, before it could allow it to be binding upon them.

It is important to see to what result it might lead. Suppose an executor opened an executorship account with his banker, on the usual terms allowed by a banker, which is, giving interest on both sides, or at compound interest at 5*l.* per cent. per annum, and I assume that the executor allows this account to be overdrawn, and that a balance became due against him, and that he allows this to go on so long as to exhaust the estate of the testator, and thus make an estate, which was solvent at his death, insolvent some ten years afterwards by this mode of dealing with it: would this accumulated amount of interest be allowed the executor in this Court, in passing his accounts in an administration of his testator's estate, against creditors or even against legatees? I apprehend that it would be contrary to all principle so to permit it, that it would be disallowed,

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and that the executor would have to bear the loss himself.

Yet practically this is exactly what was done in the present case. The real actual balance due to the estate of the testator was about 2,000*l.*, it is put down at 7,000*l.*, but if more than 2,000*l.* is drawn out, the amount so drawn out will accumulate at compound interest against his estate. If it had been set at 2,000*l.*, and if everything beyond that had been entered as an advance made by the banker, Mr. Robins, to the Plaintiffs, they would then have known what they were about, and it would have been at their option to have borrowed such money or not. But, as it stands, they are completely misled. It is not in fact a settlement of account between the late firm and the continuing partners, and it is a mode of inducing the legal personal representatives, to open an account with the continuing partners in a most ruinous manner for the representatives, of which they are not likely to see the effect till after the lapse of a considerable time. When I say this I impute no fraud or deceit to anyone, it was done quite *bona fide*, it was thought right by the continuing partner and by his clerks, but, in my opinion, they were in error in so thinking.

The only additional question which I have to consider is, how far the Plaintiffs are bound by acquiescence. So far as the widow is concerned, I do not see any evidence affecting her, but as regards the son, the following facts are clearly proved:—he knew from the beginning that the account was so kept, he was a gentleman conversant with mercantile and banking accounts, and if he had considered the matter, he must have understood what the effect of it would be. His letters shew that he did so, and by one letter, dated the

24th of August, 1854, he urges the sale of the securities, because, he observes, *that these accounts are steadily increasing at compound interest.* I select this, as the strongest expression that I have found amongst them; and I think it unnecessary to go through the rest of the correspondence. This was the part of the case which, in my opinion, required most consideration, and for which purpose I reserved my judgment, and which I have fully considered, with a careful perusal of the evidence, in conjunction with it and the facts stated by Mr. Corset and the other witnesses for the Defendant.

My final conclusion is this:—Regarding the whole matter, the position of the Plaintiffs, the absence of any settlement until 1851, when the Defendant was on the eve of selling the business; considering also the youth and, to some extent, the dependent situation of the Plaintiff C. J. Bate, I am of opinion that this knowledge, on the part of the testator's son, is not to be considered, in this Court, as such an acquiescence in and adoption of this mode of taking the accounts, between the late firm and the continuing partners, as can bind the Plaintiffs into what, if I am correct, would amount to a *devastation* of their testator's estate. Besides the various circumstances which weigh upon me and which I have already noticed, it is no immaterial circumstance to be considered, that the late Defendant ceased to be a banker in August, 1851, that since that time, although the account has been kept at the banking establishment of the *Birmingham and Midland Banking Company*, it is no account with them, or one in which they have any concern, it is simply an account between the executor of the late partner and the late Defendant, and it does not appear that at any time, certainly not after the sale to the *Birmingham and Midland Company*, it would have been open or possible

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for the Plaintiffs to have paid a large sum of money into that account and have charged the Defendant with compound interest upon it. If, in *September*, 1851, the Plaintiffs had raised, on other property of their testator, such a sum as 10,000*l.* and paid it into the *Birmingham and Midland Banking Company*, not in order to open an account with that bank, but simply in order to increase the sum to their credit, in their account between them and Mr. *Robins*, I am of opinion that he would justly have been entitled to say "I am not bound to pay interest at 5*l.* per cent. with annual rests on the money so paid in;" and if I am right in this, it shews that, in this respect, the mode of keeping the accounts, contended for by the Defendants, is even worse than if it had been a mere common banking account between the Plaintiffs and Mr. *Robins*, in which case they might have paid in what they pleased and have obtained compound interest on their balance: but though the Plaintiffs could not adopt this course, yet the securities could not be realized without Mr. *Robins*' consent, and the longer he delayed that consent, the greater was the amount of compound interest which he was accumulating against the estate of his late partner. This system of taking accounts between the estate of a deceased partner and the surviving partner is radically defective, the more it is considered, the worse it appears, and, in my opinion, the acts of the Plaintiff have not bound them to adopt it. The consequence will be, that I shall make a decree to the following effect:—

This Court being of opinion, on consideration of the evidence given in this cause, that no account has been settled between the Plaintiffs or either of them and the late Defendant *Robins*, or between the Plaintiffs and the present Defendants, and being further of opinion that the Plaintiffs are not bound by the mode in which the accounts have been kept in the books of the late Defendant

Defendant *William Robins* :—take an account of all the partnership dealings and transactions of the firm of *Bate & Robins*, from the foot of the last account settled between the said testator *John Bate* and the late Defendant *William Robins*, and let the balance, if any, due to the estate of the testator at the time of his decease be ascertained. And take an account of what has been paid by the late Defendant *Robins* to the Plaintiffs or either of them, or by their or either of their order or for their or either of their use, since the decease of the said *Thomas Bate*; and in taking such accounts, let such sums only as were actually received and got in respect of the accounts in the pleadings in this cause entitled "*the dead balances*," and which were not taken to by the said *William Robins* in continuing to carry on his trade or business of a banker, be treated as assets of the said partnership of *Bate & Robins*, and let those sums, respectively, be treated as such assets only from the times when the same were got in or received respectively; and in taking such accounts the estate of the said Defendant *William Robins* is to be charged with simple interest at *5l. per cent. per annum* on such balances, if any, which may appear, after the decease of the said *Thomas Bate*, to have been due from Defendant *William Robins*, from time to time, to the estate of *Thomas Bate*; and in like manner, in taking such accounts, the estate of *Thomas Bate* is to be charged with simple interest at *5l. per cent. per annum* on all balances, if any, which appear to have been due, after the decease of the said *Thomas Bate*, from the Plaintiffs or either of them to the Defendant *Robins*. And the Defendants are to admit assets of *William Robins* sufficient to answer what, if anything, on taking such accounts may appear to be due from him; or take an account of his estate, &c.

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NOTE.—See *Boddam v. Ryley*, 1 Bro. C. C. 239; 2 Bro. C. C. 2; 4 Bro. Parl. Ca. 561, and *Ferguson v. Fyffe*, 8 Cl. & Fin. 121.

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## CROSSKILL v. BOWER.

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Where the account between a banker and his customer is kept at compound interest, and the customer dies, the final balance at his death, in the absence of contract, carries no interest. It is the same where the balance is in the customer's favor, and the banker dies, or ceases to carry on business, or becomes bankrupt.

A bankers' account was kept at compound interest.

In 1847, the customer gave the bankers a security for all moneys then due or thereafter to become due, "with interest for the

same after the rate of 5*l.* for every 100*l.* by the year." In 1855, the customer assigned all his estate to trustees for the benefit of his creditor, and his banking account ceased.

*Held* that, under this security, the bankers were entitled to compound interest down to the date of the creditors' deed, but to simple interest only afterwards.

The rule of the Court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as trustees, derive any pecuniary benefit to himself.

Three trustees, two of whom were bankers, were empowered to carry on a business and to borrow money "from any bankers or other persons" for that purpose. The bankers made advances of money to the trust at compound interest. *Held*, that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances.

## BOWER v. TURNER.

THESE two suits, which involved similar questions, were heard together, and the Court declared one judgment only applicable to both.

It appeared that in 1847, and previously thereto, Messrs. *Bower & Hall* carried on the business of bankers at *Beverley*, at which place Mr. *Crosskill* carried on the business of iron founder and agricultural implement maker. Mr. *Crosskill* was a customer of the bankers, with whom he had two accounts, one as iron founder and the other as partner of a firm of *Malams, Crosskill & Co. of Hamburg*.

It was the custom of Messrs. *Bower & Hall* to keep their accounts with their customers at 5*l.* per cent., making annual rests, and this mode had been followed in the accounts of Mr. *Crosskill* and had been assented to by him.

In 1847 both these accounts were considerably overdrawn, and on the 15th of December, 1847, Mr. *Crosskill* conveyed his interest in some gas-works, and his

same after the rate of 5*l.* for every 100*l.* by the year." In 1855, the customer assigned all his estate to trustees for the benefit of his creditor, and his banking account ceased.

*Held* that, under this security, the bankers were entitled to compound interest down to the date of the creditors' deed, but to simple interest only afterwards.

The rule of the Court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as trustees, derive any pecuniary benefit to himself.

Three trustees, two of whom were bankers, were empowered to carry on a business and to borrow money "from any bankers or other persons" for that purpose. The bankers made advances of money to the trust at compound interest. *Held*, that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances.

his mill and foundry and other property to Messrs. *Bower & Hall*, to hold by way of mortgage for securing the payment to the bankers of all moneys then due or thenceforth to become due to them ; in the first place, for such sum or sums as then were or thereafter should be so due from *William Crosskill* on his separate account, and in the next place, for such sum or sums as then were or thereafter should be so due from the firm of *Maldams, Crosskill & Co.* on their co-partnership account, with interest for the same after the rate of 5*l.* for every 100*l.* by the year.

The dealings between Mr. *Crosskill* and the bankers continued, but Mr. *Crosskill* having in 1852 commenced a separate business of millet, two accounts were then opened with him and the bank, viz., "the general account" and "the mill account."

In January, 1855, both these accounts were greatly overdrawn, and Mr. *Crosskill* executed two creditors' deeds, dated the 23rd and 24th of January, 1855, by which he conveyed all his real and personal estate to Messrs. *Bower & Hall* and *Thomas Ellery Turner* (their cashier), upon trust to realize and pay the expenses, and then to pay the creditors of Mr. *Crosskill* rateably, and to pay the residue (if any) to Mr. *Crosskill*. The deed provided, that the trustees might, "in their or his uncontrolled discretion, continue to carry on, for any length of time, either in their own names or in the name of Mr. *Crosskill*, or in the name or names of any other person or persons, so far as they lawfully might, as they should think best, all or any of the businesses and trades which he, Mr. *Crosskill*, had theretofore carried on, either at *Beverley* or elsewhere," &c. And also, that the trustees "might, from time to time, pay all expenses incident to carrying on such trades and businesses, out of the trust money

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money and premises, or from time to time *borrow at interest, and with or without any security, from any bankers* or other persons, any sums of money, which the said trustees or trustee might think proper, for the purpose of carrying on the said businesses or paying creditors, in part or in full, or for any of the purposes of the trusts or powers therein contained, and without the said trustees or trustee being, in any manner, liable or accountable for or by reason of any pecuniary or other loss or injury which might happen to Mr. *Crosskill* or any of his creditors thereby."

On the execution of these deeds, Mr. *Crosskill* ceased to carry on business, and he neither paid into or drew out of the bank any other moneys, and the account was virtually closed. The trustees of the creditors' deeds however opened two accounts at the bank, one called the mortgage account and the other the general account, in the names of "The Trustees of *William Crosskill*." They carried on the mill business until 1860, and they still carried on the business of iron founders.

Accounts were furnished by the trustees to Mr. *Crosskill* in *October*, 1851, when it appeared that they had kept their banking accounts with Messrs. *Bower & Hall*, and had obtained from them advances of money for the purposes of the trust, for which the bank had charged the trust estate with interest at 5*l.* per cent., and with annual rests. The right thus to charge compound interest was contested by Mr. *Crosskill* and gave rise to these two suits.

The first suit, of *Crosskill v. Turner*, was instituted by Mr. *Crosskill* against the bankers, for the execution of the trusts of the creditors' deeds of 1855, and to take the accounts. It asked a declaration that, in taking the accounts,

accounts, the banking firm were not entitled to be credited with compound interest, but with simple interest only, at the rate of 5*l.* per cent. per annum on the moneys due to them at the date of the indenture of 24th of *January*, 1855, and on the moneys (if any) since advanced by them to the trustees of the same indenture.

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The second suit of *Bower v. Turner* was instituted by Messrs. *Bower & Hall* against *Thomas Ellery Turner*, Mr. *Crosskill* and the new partners of the banking firm, for a foreclosure of the mortgage of the 15th of *December*, 1847. It alleged that about 81,000*l.* was due to the bank, with interest from the 31st of *December*, 1861, but that Mr. *Crosskill* alleged, that it was made up in part by computing compound interest, and that the Plaintiffs were not entitled to compute interest on that principle. The Plaintiffs charged, that the debt was contracted with them as bankers, and that the balances had been properly computed on the principle of compound interest, according to the custom of the Plaintiffs and country bankers generally, and that with the knowledge of Mr. *Crosskill*. The bill also contained the following statement :—

“ After the execution of the indenture of the 24th of *Januury*, 1855, the trustees had not funds in their hands sufficient to enable them, conveniently, to pay the interest from time to time accruing on the balances due to the Plaintiffs on their aforesaid security, and therefore, for the benefit and convenience of the trust estate, *T. E. Turner*, on behalf of himself and his co-trustees, arranged with the Plaintiffs, that the interest on the moneys due to the Plaintiffs, on their aforesaid security, should be continued to be computed and added to the amount of the Plaintiffs' debt, in the same manner as the same had been computed and added prior to the date of the indenture

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denture of assignment. And in consequence of such arrangement, the Plaintiffs did not require the regular annual payment of the interest accruing due to them, as would otherwise have been the case. The Defendant *W. Crosskill* was aware of such arrangement and did not offer any objection thereto until the beginning of the present year."

"The Plaintiffs are advised and insist that the said *T. E. Turner* had full power, under the provisions of the indenture of assignment, to enter into such arrangement with the Plaintiffs, and that the arrangement was and is valid and binding."

The *Solicitor-General* (*Sir R. Palmer*), and *Mr. L. J. Humphreys*, for Mr. *Crosskill*, argued that his banking account closed on the 24th of *January*, 1855, and that the balance, being then ascertained, carried simple interest only, under the mortgage deed of 1847, as it would in the case of the death, bankruptcy or insolvency of a customer of the bank; *Boddam v. Ryley* (*a*); *Fergusson v. Fyffe* (*b*).

Secondly, that the bankers, being trustees under the creditors' deed, could not borrow of themselves at compound interest; that they could not derive any profit from their fiduciary duties; *Bentley v. Craven* (*c*); *Broughton v. Broughton* (*d*); or place themselves in a position in which their interest conflicted with their duty. Here the trustees were dealing with themselves and not with strangers, and they might, for their own interest, postpone the realization of the assets and the winding-up of the trusts, far beyond what was beneficial to their *cestuis que trust*.

Mr.

(*a*) 1 *Bro. C. C.* 239.
 (*b*) 8 *Cl. & Fin.* 139.
 (*c*) 18 *Beav.* 75.

(*d*) 5 *De G., M. & G.* 160,
 164.

Mr. Baggallay and Mr. Fry for other partners in the banking firm.

Mr. Selwyn and Mr. Bury, for *Bower & Hall*, argued that the mode of keeping the accounts with rests, having been originally adopted between the parties, must be continued until those accounts were closed by payment of the balance due; *Rufford v. Bishop* (a); *Lord Clancarty v. Latouche* (b).

Secondly, that the special terms of the deed justified the trustees in borrowing from the bankers on the usual terms, and that they could not be said to have derived any profit from their office, by advancing money on the same terms as any other bankers would have done.

The Solicitor-General in reply.

The Master of the Rolls.

The first question I have to determine is, the propriety of allowing compound interest on the principal secured by the mortgage. In considering this point it is necessary to see whether it is concluded by any contract between the parties themselves, or whether their dealings, in the present case, amount to any implied agreement or acquiescence on their part. For this purpose it becomes necessary, in the first instance, to examine the mortgage deed of December, 1847, in conjunction with the course of dealing between the parties themselves. This deed conveys certain property of the Plaintiff to Messrs. *Bower & Hall*, bankers at *Beverley*, to hold the same, by way of mortgage, to secure the payment of

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(a) 5 Russ. 346.

(b) 1 Ball & B. 420.

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of all moneys then due or thenceforward to become due to them on the banking accounts, "with interest for the same after the rate of 5*l.* for every 100*l.* by the year."

It was the custom of Messrs. *Bower & Hall* to keep their accounts with their customers at 5*l.* per cent. making annual rests, and Mr. *Crosskill's* accounts with them had been so kept and had been assented to by him. As long, therefore, as he carried on business, this was the proper mode of keeping the accounts, and this continued down to the execution of the deed of *January, 1855*. But, on the execution of that deed, he ceased to carry on business, he ceased to pay any moneys into or to draw any moneys out of the bank, his account ceased as an ordinary mercantile current account, and the final balance due to the bank was then ascertained.

I am of opinion that, after that period of time, only simple interest at 5*l.* per cent. per annum can be claimed under this mortgage deed, and that the Messrs. *Bower & Hall* are not entitled to take the account making annual rests and charging interest on the balance so augmented, year by year. Unless the interest were given by the words of the mortgage deed, and in the absence of any other agreement for that purpose, I am of opinion that only simple interest can be charged. I look at it in the same light as if a customer, keeping an account with the bank, had died ; if, in that case, no fresh account had been opened by his executor, all that the bankers could have claimed against his estate would have been, the balance due at his death, which would be a mere simple contract debt and not carrying interest at all. The arrangement between a customer and the bank terminates on his death, and in the absence of any contract varying it, all interest would cease at that period. It would be exactly the same if
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the balance were in his favor, and the bankers had died or ceased to carry on business, or had become bankrupt; in those events, the balance would have to be ascertained at that period and the interest would cease.

But this stoppage of interest is not confined to the case of death; a customer may say to his banker "I close my account with you and I shall have no further dealings with you from this day," thereupon the balance of the account, whichever way it may be, would have to be ascertained at that period, and then all interest would cease. It depends on the pleasure of the bankers, either to enforce payment of the balance due to them or to abstain from doing so, or to obtain such security for it as they may be able. If the last course were adopted, a new contract would be entered into, which would regulate the matter of interest.

In this case, the deed of mortgage is exactly such a contract, and this is a continuing security for a fluctuating balance, to be kept on the former terms of customer and banker; but when the final balance is ascertained, it stops the dealings as between customer and banker, and it provides that the balance so ascertained shall bear interest at 5*l.* per cent. per annum; but it makes no direction as to compound interest or annual rests, and it contains no reference to any custom of bankers. It is the contract between the parties which regulates how the debt is to be secured. As long as the account was kept as an open current account, it secured a floating balance, regulated by the custom of bankers and the dealing between the bank and the particular customer; but as soon as the account was closed as a current mercantile account, then the balance ceased to be the previous fluctuating balance, and upon that ascertained balance the deed gives only 5*l.* per cent.

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cent. per annum. After that, the account remained open for the purpose of liquidation, but not for the purpose of receiving or paying anything. After the 24th of January, 1855, as I understand the evidence, Messrs. *Bower & Hall* would not have honored any cheque drawn by Mr. *Crosskill*, and to have enabled him to do so, a fresh and distinct account must have been opened between him and the bank.

It is argued, on behalf of the Defendants, that a bankers' account is not closed until it is paid, and this is undoubtedly true, in one sense of the term, but its character is essentially altered. When a merchant who keeps an account current with his banker dies, it ceases to be a common mercantile account current, and becomes a simple contract debt due from his estate, on which, in the absence of any contract, no interest can be charged. It is true that, in many cases, a question of some nicety, in point of fact, might arise, as to whether the account was closed or not, in the sense in which I have used the term, and this question the Court might have to determine on evidence; but, in the present case, no difficulty arises on this point, for it is the common case that, in the sense in which I have explained the term, the account was closed with the execution of the deed of 24th of January, 1855, after which time, it is regulated by the mortgage deed, which gives simple and not compound interest at 5*l.* per cent. per annum.

On this point, the deed of January, 1855, has no application; it has a distinct and important application to the question of the interest to be allowed for moneys raised by the trustees; but it contains nothing that can affect the question as to whether, on the balance secured by the mortgage deed, interest is to be calculated at compound interest or at simple interest.

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This, which I consider to be the principle regulating the accounts of this character, is, in my opinion, very distinctly laid down by the authorities on this subject. The case of *Ferguson v. Fyffe* (a), is the only one of those cited to me which it is necessary to refer to. In that case, the House of Lords held, that the account between a customer and his banker in *India* was closed, for the purpose of compound interest, on the death of the customer. It is true that, in that case, the customer had become of unsound mind in 1793, when the balance was in his favor; but, as the bank had rendered an account on his death in 1810, charging themselves with compound interest up to that time and admitting a certain balance to be then due from them, they were bound by that account, which they did not contest, and therefore nothing turned on the rate of interest during that period, but, from 1810, the bankers were held to be liable only for simple interest, and it was distinctly laid down, in that case, that no title to compound interest could exist without a contract or a custom, and their Lordships also held (which is the more important, as it related to a case which, being in *India*, was one to which the usury laws then in force did not apply), that a valid custom for compound interest could not exist, except in mercantile accounts for mutual transactions. If this remark be considered as confined to this country, at a time when the usury laws were still in force, it is to be observed, that the repeal of those laws does not make a custom valid which was invalid before, nor is any custom attempted to be proved, in this case, for the charging of compound interest when the account ceases to be an account current for mutual transactions. Custom, therefore, cannot be set up, in this case, and contract there is none.

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(a) & Cl. & Fin. 139.

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It is said that this view of the matter is inconsistent with other decided cases, and I am referred to *Rufford v. Bishop* (*a*), and to *Lord Clancarty v. Latouche* (*b*). If this were so, I should be compelled to follow the decision of the House of Lords; but, in truth, the cases are not inconsistent.

*Rufford v. Bishop* (*a*), only decided that, in a case between customer and banker, where the account was kept with annual rests, and a mortgage had been given for the fluctuating balance, which might be due between the banker and his customer at the close of their account, it was perfectly legal that the final balance, though kept at compound interest, should, when ascertained, be charged on the lands. All that this case determines in favor of Messrs. *Bower & Hall* is, that the mortgage given in 1847 is a good mortgage for the balance due from the Plaintiff in *January*, 1855, although that balance consisted partly of principal and partly of interest calculated with annual rests, which is admitted on both sides to be correct. But the point I am now considering, viz., whether, after the final balance had been ascertained, the interest could still go on and be calculated at compound interest, did not arise in that case, at least it was not contended for, and, as far as the words of the judgment go, would seem to be negatived by the words used by Sir *John Leach*.

In *Lord Clancarty v. Latouche* (*b*), the point I am now considering does not seem to have been argued, and as far as may be gathered from the Lord Chancellor's judgment, he treated the matter solely as an account between Mr. *Conolly*, who had died in 1803, and the

(a) 5 Russ. 346.

(b) 1 Ball &amp; B. 420.

the Defendants, the bankers. The decree in the cause was made five years after his decease, and the Master's report, allowing compound interest on the balance due at his death, had been disallowed by the Lord Chancellor. After this, the Master made a fresh report, finding a large balance due to the estate of Mr. *Conolly*; the case came before the Court on exceptions and on a petition to the Lord Chancellor to rehear his former order, and on that occasion, the Lord Chancellor varied his order and directed the accounts to be taken with annual rests, on the assumption that Mr. *Conolly* must be taken to have agreed at the end of each year, that this interest should be treated as capital. It certainly does seem as if the Court had made no distinction in the mode of taking the accounts before and after Mr. *Conolly's* death; but judging from four lines in page 429, it does appear that the executors of Mr. *Conolly* had carried on the account with the bankers on the same principle as a mutual account current, and also that it was for their interest that the account should be continued on the same principle, as they had made advances by which the principal had been reduced.

Lord *Manners* says (*a*), "In directing the accounts I am much inclined to adopt the principle on which the Defendants furnished the accounts; it is so far fair that the Plaintiffs" (that is, the executors of Mr. *Conolly*) "*get interest on their advances by their being applied to reduce the principal.*"

On the first point, therefore, viz., the manner in which the account of the mortgage debt is to be calculated, I am of opinion, that in making the decree for foreclosure or redemption, the debt, consisting of principal, interest  
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(*a*) 1 *Ball & B.* 429.

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and costs, is to be ascertained by calculating simple interest at 5*l.* per cent. per annum from the 24th of *January, 1855.*

The second point, on which the question of whether interest is to be allowed with yearly rests, arises in this way:—the trustees, in order to carry on and manage the business which were intrusted to them by the deed of 24th of *January, 1855,* had large powers of borrowing money from bankers; and if they had, when occasion required it, opened an account with a banker and obtained an advance on the usual bankers' terms, of calculating interest at 5*l.* per cent. with compound interest, it would have been difficult to have held that they were not entitled to charge this against the Plaintiff; but the difficulty here arises from the circumstance, that they are both trustees and bankers, and that, in their character of trustees, they have borrowed money from themselves in their character of bankers, and that they have, as bankers, charged themselves, as trustees, with interest at 5*l.* per cent. on the annual balance to the debit of themselves, as trustees, in the books of the bank, such account of balance being composed of principal and interest.

The question is, whether, having undertaken the office of trustees, it was open to them to adopt this course. It is argued that, in fact, the Plaintiff's estate had the benefit of this course of proceeding, and that, if the money had been obtained from any other banker, it would have been upon less advantageous terms, or fettered with securities, impediments and difficulties which would have been very injurious to the trades. I think the rule of this Court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as a trustee, derive any pecuniary benefit to himself.

himself. The cases are very numerous, the principle is clearly laid down in them, and is of universal application. It is well expounded in the case of *Broughton v. Broughton* (a), which was cited to me, where, after stating the rule fully and as applicable to all cases, the Lord Chancellor observes, "the result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself."

In this case, Messrs. *Bower & Hall*, the trustees, have sought to make a profit of their fiduciary duties, by employing themselves as bankers, and by advancing, in that character, money to be repaid at compound interest. In the absence of a contract for that purpose, either express or implied, I am of opinion that they are not entitled so to do.

I have then to examine whether there exists any contract express or implied enabling them so to do. The only express contract between the Plaintiff and Defendants is the deed of 24th of January, 1855, and the passage in it which bears on this subject is the following [see *ante*, p. 87]. The clause I have read does not, in my opinion, justify the trustees in lending to themselves, and I cannot look at this case in any different point of view than I should do, if the trustees had been private gentlemen instead of being bankers, the same duties attach to them and they are under the same obligations. The power to borrow from *any* banker does not mean that they could themselves, as bankers, advance the money. It may be, for aught the Court can now ascertain, that from other bankers they might have obtained an advance at simple interest, or that they might have obtained a loan from persons not bankers,

(a) 5 *De G., M. & G.* 164.

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Crosskill v. Bower.
Bower v. Turner.

1863.



CROSSKILL

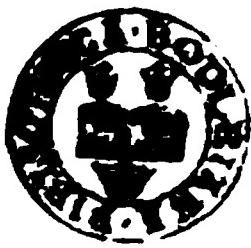
^{v.}

BOWER.

BOWER

^{v.}

TURNER.



bankers, who might have advanced funds at simple interest at 5*l.* per cent. on such security as the estate of Mr. *Crosskill* in their hands could have afforded. Whether this be so or not cannot be now ascertained, for the trustees have not made the attempt, but have considered themselves justified in advancing the money required. But this very impossibility, of ascertaining whether it was or not necessary to do so, shews the reason of the rule. In order to entitle them to do so, the deed ought expressly to have authorized them, as bankers, to advance such moneys as they might think fit in the ordinary manner of an advance of bankers to customers; but the deed contains no such power. The consequence is, that there is no express agreement authorizing the trustees to advance money at compound interest to carry on the concerns intrusted to them.

I have then to consider whether there be any implied agreement to this effect. The only agreement that could be implied, in the circumstances of this case, and indeed the only implied agreement that is alleged by the Defendants is, the knowledge of the Plaintiff that they were so kept and his acquiescence in their being so kept. If this fact had been established, I should have adopted the conclusion come to by Lord *Manners* in *Lord Clancarty v. Latouche*(a), and I should have held that Mr. *Crosskill* was bound, by seeing the accounts so kept and making no objection on the subject, to admit the claim. But, on examining the evidence on this point it appears, that Mr. *Crosskill* deposes, positively, to his total ignorance of the fact that the accounts were so kept, until the accounts were furnished on the 7th of October, 1861, and that he thereupon immediately objected to them. On the other hand, the evidence on the

(a) 1 *Ball & B.* 420.

the part of the Defendants wholly fails in establishing any knowledge in the Plaintiff that the accounts were so kept, and as the burthen of proof lies on the Defendants to establish this fact, I should, even in the absence of any express denial on the part of the Plaintiff, be unable to come to the conclusion that he had so acquiesced.

With regard, therefore, to this second point, as to the mode of calculating interest, I am compelled to hold, that, by law, the trustees are not entitled to claim more than simple interest at 5*l.* per cent. on the sums advanced by them, and that no agreement express or implied exists which entitled them to do otherwise.

1863.
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CROSSKILL  
v.  
BOWER.  
BOWER  
v.  
TURNER.

#### COTCHING *v.* BASSETT.

THE Plaintiffs were the lessees of a house and premises, being No. 32, on the east side of *Wood Street, Cheapside.*

The Defendant was the owner of the adjoining house and premises on the north, being No. 33, in the same street.

The Plaintiffs' and Defendant's premises both consisted of houses abutting on the street, with a yard at the back separated by a wall some twelve or fifteen feet high. On the Plaintiffs' yard there were buildings about ten feet high at a distance of six and a half feet from

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Dec. 3, 4, 9.  
Any alteration  
of ancient  
lights, al-  
though not  
prejudicial to  
the owner of  
the servient  
tenant, gives  
him a right to  
obstruct them.

The owner  
of a dominant  
tenement, in  
the course of  
re-building,  
materially  
altered his  
ancient lights;  
this was done  
after commu-  
nication with  
the owner of  
the servient

*tenement, and with the knowledge and under the inspection of his surveyor, but without any express agreement. Held, that, in equity, the lights, as altered, could not be interfered with, and a perpetual injunction was granted.*

1862.

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COTCHING
v.
BASSETT.

from the party wall. And on the Defendant's yard, there were buildings whose heights varied from thirteen feet to twenty-three feet. The open space above these buildings in the yards afforded light and air to the backs of the two houses and to the back premises. The Plaintiffs' lights derived from the Defendant's premises were admitted to be ancient lights. It is also necessary to state, that the Plaintiffs' yard was shut in on the south and east by walls about forty-seven feet high.

In 1861, the Plaintiffs were desirous of re-building their premises and of altering their ancient lights, and plans were prepared by Mr. *Laws* their architect, which were submitted to Messrs. *Tillott & Chamberlain*, the Defendant's architects, but they did not concur and no final agreement was come to on the subject.

In addition to this, the Plaintiffs, who were also tenants of No. 33, were desirous of extending their occupation to *Lady-day*, 1862, in order to enable them to make the contemplated alterations in No. 32. After some negotiation, the Plaintiffs and Defendant signed an agreement, dated the 4th of *October*, 1861, by which it was agreed as follows:—"That the Plaintiffs, in consideration of the Defendant allowing the Plaintiffs to continue tenants of the premises, No. 33, *Wood Street*, from the 29th day of *September*, 1861, to the 24th day of *March*, 1862, would forthwith pull down and re-build the party wall between Nos. 32 and 33, *Wood Street*, in accordance with the plan and section thereto annexed, on a good, solid and sufficient concrete foundation, it being at the same time understood, that the east end of such party-wall should be of the same thickness in extent as the portion of the party-wall adjacent to it westward. And further that they would build up all flues, &c., &c."

And

And further, "that they (the Plaintiffs) would not encroach upon or attempt to interfere with any legal or other rights of the Defendant ; and that they would not interfere with the Defendant's rights (if any) to raise the eastern portion of the party-wall between the then present lead flats." The Plaintiffs agreed to pay 150*l.* for rent; and also that they would complete the whole of the work thereinbefore specified, or referred or incident thereto, before the 24th day of *March*, 1862, to the entire satisfaction of Messrs. *Tillott & Chamberlain* and Mr. *Laws*.

In the same month of *October*, 1861, the Plaintiffs pulled down and re-built the back premises, and the improvements were completed by *Lady-day*, 1862. During the progress of the work, it was constantly inspected by the Defendant's architect Mr. *Tillott*, and there being a high wall of about forty-seven feet high to the south of the Plaintiffs' premises, and the party-wall of fourteen feet ten inches at the north, a line of light was drawn from the top of that wall on the south to the top of the party-wall on the north, above which it was settled by *Tillott, Law* and the builder, that the Plaintiffs' elevation should not transgress.

The Plaintiffs' alterations and improvement were completed by *Lady-day*, 1862, and thereby the buildings in the Plaintiffs' yard were raised, though not above the line of light before alluded to, and the Plaintiffs' ancient lights were considerably varied and increased.

On the 16th of *July*, 1862, the Defendant gave the Plaintiffs notice, under the Metropolitan Building Act, (18 & 19 Vict. c. 122,) of his intention, at the end of three months, to raise the party-wall between No. 32 and No. 33, to a height of thirty-four feet ten inches above the level.

The

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—
COTCHING
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1862.

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COTCHING  
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The Plaintiffs instituted this suit in *October*, 1862, alleging that this would most seriously obstruct the access of light and air to their premises, and praying an injunction to restrain the Defendant from raising the party-wall.

Mr. *Southgate* and Mr. *A. G. Marten*, for the Plaintiffs, argued, first, that the Defendant had acquiesced in, encouraged and sanctioned the alterations made by the Plaintiffs in the ancient lights, upon the faith of which, the Plaintiffs had made a great outlay in re-building and altering their premises. That consequently the Defendant was precluded, in equity, from insisting that the Plaintiffs by altering their ancient lights had, at law, forfeited all right to them; *The East India Company v. Vincent* (*a*); *Lewes v. Sutton* (*b*); *Short v. Taylor* (*c*); *Bankart v. Houghton* (*d*); *The Duke of Devonshire v. Eglin* (*e*); *Rochdale Canal Company v. King* (*f*); *Somersetshire Canal Company v. Harcourt* (*g*); *Duke of Beaufort v. Patrick* (*h*); *Mold v. Wheatcroft* (*i*); *Powell v. Thomas* (*k*).

Secondly, that at all events, upon the Plaintiffs' restoring or undertaking to restore the ancient lights to their former state, the Court would then restrain the Defendant from interfering with them; *Hutchinson v. Copestake* (*l*); *Jones v. Tapling* (*m*); *Binckes v. Pash* (*n*); *Cooper v. Hubbuck* (*o*); *Renshaw v. Bean* (*p*); and see *Weatherly v. Ross* (*q*).

Mr.

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|-------------------------------------------|--------------------------------------------------------------------------------|
| ( <i>a</i> ) 2 <i>Atk.</i> 82.            | ( <i>k</i> ) 6 <i>Hare</i> , 300.                                              |
| ( <i>b</i> ) 5 <i>Ves.</i> 687.           | ( <i>l</i> ) 9 <i>C. B. Rep. (N. S.)</i> 863.                                  |
| ( <i>c</i> ) 2 <i>Eq. Ca. Ab.</i> 522.    | ( <i>m</i> ) 11 <i>C. B. Rep. (N. S.)</i> p.<br>298.                           |
| ( <i>d</i> ) 27 <i>Beav.</i> 425.         | ( <i>n</i> ) 11 <i>C. B. Rep. (N. S.)</i> 324.                                 |
| ( <i>e</i> ) 14 <i>Beav.</i> 532.         | ( <i>o</i> ) 30 <i>Beav.</i> 160, and 12 <i>C. B.</i><br>( <i>N. S.</i> ) 456. |
| ( <i>f</i> ) 16 <i>Beav.</i> 630.         | ( <i>p</i> ) 18 <i>Q. B. Rep.</i> 112.                                         |
| ( <i>g</i> ) 2 <i>De G. &amp; J.</i> 596. | ( <i>q</i> ) 1 <i>Hem. &amp; M.</i> 349.                                       |
| ( <i>h</i> ) 17 <i>Beav.</i> 60.          |                                                                                |
| ( <i>i</i> ) 27 <i>Beav.</i> 510.         |                                                                                |

Mr. *Buggallay* and Mr. *De Gex*, for the Defendant, argued that the Defendant had in no way assented to the alteration of the ancient lights; that the Plaintiffs had varied and extended them in their own wrong, knowing that they had no right so to do; that they must therefore take the consequences of the wrongful act; *Clare Hall v. Hardey* (*a*).

Secondly, that all the Defendant's rights had been expressly reserved to them by the terms of the agreement, by which the Plaintiffs agreed, "that they would not encroach upon or attempt to interfere with any legal or other rights of the Defendant, and that they would not interfere with the Defendant's rights (if any) to raise the eastern portion of the party-wall between the then present lead flats."

Thirdly, that by the alteration of the ancient lights, the Defendant had acquired, at law, a right to block out the whole, and that there was no equity to restrain the exercise of this legal power; *Garritt v. Sharp* (*b*); *Moore v. Rawson* (*c*).

Mr. *Southgate*, in reply, cited *Dann v. Spurrier* (*d*).

#### *The Master of the Rolls.*

The question in this case is, whether the Plaintiffs are entitled to an injunction to restrain the Defendant from raising the party-wall between No. 32 and No. 33, *Wood Street, Cheapside*.

Dec. 9.

The Plaintiffs are the lessees of No. 32, and the Defendant

(*a*) 6 *Hare*, 273.  
(*b*) 3 *Adol. & Ell.* 325.

(*c*) 3 *Barn. & Cr.* 332.  
(*d*) 7 *Ves.* 231—5.

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*COTCHING*  
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*BASSETT.*

1862.  
 COTCHING  
 v.  
 BASSETT.

fendant is the owner of No. 33. The Plaintiffs were also lessees of No. 33, their tenancy of which expired at *Michaelmas*, 1861, but which was extended to *Lady-day*, 1862, in order to enable the Plaintiffs to make certain alterations in No. 32. At the back of these premises were two yards separated by a continuation of the party-wall some twelve or fifteen feet high. The Plaintiffs wanted to alter their ancient lights looking into the back yard and improve their premises. According to the latest decisions, if they had done so without the sanction and permission of the Defendant, the Plaintiffs would have lost their right to preserve their own ancient lights, and the Defendant would have acquired what he did not before possess, namely, the right of raising his party-wall to any height and of excluding all the Plaintiffs' light.

In fact, the present state of the law would seem to establish, that any alteration in ancient lights, although not prejudicial to the neighbour, gives the neighbour a right to obstruct them, and that no person possessing lights overlooking a neighbour's property can alter them, in any respect, without the permission of the neighbour.

In this state of the law, and before taking any steps, the Plaintiffs applied, by their surveyor, to the Defendant, for his permission to make certain alterations and improvements in his premises; thereupon several interviews took place between the surveyors of the Plaintiffs and the Defendant, and these ultimately ended in an agreement of the 4th of *October*, 1861, executed by both parties [see *ante*, p. 102].

Thereupon the Plaintiffs proceeded to effect their improvements, which they completed by *Lady-day*, 1862. They were examined all along by *Tillott*, and were

were so arranged as not to exclude Defendant's light, and there being a high wall to the south of Plaintiffs' premises, they drew a line of light from the top of that wall to the top of the party-wall which divided the yards, in order that no part of Plaintiffs' elevation might transgress beyond that line of light. This was settled by *Tillott, Laws* and the builder.

Soon after this and in *May* following, the Defendant gave notice of his intention to raise this party-wall between the two yards, thereby wholly excluding all the light from the north from entering the Plaintiffs' windows which look east and those which look north, and in fact making them quite dark.

The Defendant's case is, that the Plaintiffs, by this course of proceeding which they have adopted, have conferred on him a right which he admits he did not before possess, namely, that of excluding all the Plaintiffs' light, by raising the party-wall to any height he pleases. If the Defendant be entitled to any such right, after the communication took place between the parties and the agreement of the 4th of *October*, 1861, it would be necessary for him to shew that he very plainly and distinctly intimated this intention to the Plaintiffs, after, at their request, they were permitted by the Defendant to make the improvements designed and approved of by his surveyor.

The Defendant refers to the agreement of the 4th of *October*, 1861, and says that the words that the Defendant "will not interfere with the Defendant's rights (if any)," were intended to meet this case. If the Defendant really, at the time, intended to use the privilege to be acquired by the acts of the Plaintiffs, as I have stated, it was incumbent on him to express this clearly.

This

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*Corching v.  
Bassett.*

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COTCHING
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BASSETT.

This is certainly not done by these words in the agreement. *Prima facie* they mean rights then existing, that is, at the date of the agreement, and not rights to be acquired by reason of the acts of the Plaintiffs. Mr. *Tillott* says, they were introduced for this purpose, but the solicitor who prepared this agreement does not say so, and I am confident that any solicitor of this Court would, in drawing this agreement, if he had intended such a serious consequence to follow, have made this clear. The solicitor is not called to give evidence and it rests on Mr. *Tillott's* assertion expressly contradicted on the other side.

My opinion is, that the words do not bear that meaning and cannot be so construed, even in the absence of express contradiction on the other side. *A priori*, it would be supposed that so serious a consequence must have been fully discussed by both sides, if it had entered into their minds. But it is manifest, on the evidence on both sides, that no such right to be acquired by the act of the Plaintiffs was made the subject of conversation between the parties. The only passage which tends in that direction is in Mr. *Tillott's* affidavit, in which he says:—

“I deny that I acquiesced in such last proposal of Mr. *Charles Laws*, and I say that I always objected to the Plaintiffs raising the said buildings above their original height, and, at one or more of the said interviews, I distinctly told the said *Charles Laws* that if the Plaintiffs should open any additional lights in the said building, the Defendant would insist upon and exercise his right of raising the party-wall to a greater height than its then existing height.”

This at best is ambiguous, and is expressly contradicted by the witnesses on the other side. When

I contrast

I contrast this with the reply given by Mr. *Laws* and with the acknowledged facts of the case, I feel convinced that this remark was never said in such a manner as to convey to the mind of the Plaintiffs or their agents the meaning now sought to be attached to it. The whole course of proceeding is wholly inconsistent with any such meaning having been conveyed to the Plaintiffs. In the first place there was the letter of the 5th of *September*, 1861; then four plans were submitted before the agreement of the 4th of *October*, 1861; these plans shewed an obvious alteration of the ancient light. If the Defendant at that time intended to obtain an advantage not then possessed by him, and to derive it by reason of the acts which the Plaintiffs might be induced to perform, it was incumbent on him to express this to the Plaintiffs in such a manner as that it could not be misunderstood. The Plaintiffs would have been obviously devoid of sense to have laid out a large sum of money for the purpose of depriving themselves of an easement of great value, which was then to become unavailable. They would be spending much money to deprive themselves of a right, with a doubtful chance of regaining that right, by spending as much more to undo all that they had done. It is impossible to impute to a reasoning being such an intention. It is manifest, therefore, that the Plaintiffs did not so understand it, and that they believed that they had the Defendant's sanction for doing what they did.

Not merely is this so, but the conduct of Mr. *Tillott* throughout is inconsistent with a notice of such an intention as is now asserted having been given. What was the use of limiting the height of the buildings to the line of light, if the Defendant acquired the right of stopping them all whenever he chose, by raising the eastern end of the party wall to forty feet?

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COTCHING  
v.  
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—  
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It is obvious that it was wholly immaterial to the Defendant whether the Plaintiffs did or did not interfere with the line of light, if he intended to build a wall forty feet higher and if this were known. The evidence shews a plain case of dealing on both sides. Here the Plaintiffs are applying to the Defendant for leave to improve, then there is a meeting of the surveyors, a discussion as to the plan, the plan is settled and executed under the inspection of *Tillott* the Defendant's surveyor, the existing rights are preserved and none on the Defendant's side are to be affected thereby. All this would be wholly useless, if the Defendant not only did not secure the Plaintiffs' rights, but actually thereby acquired a right of forfeiting them all. After this, can a Defendant come into Court and say "It is true I did not explain this myself to the Plaintiffs, nor did my solicitor, but still it was casually and as it were accidentally mentioned by my surveyor, in conversation with the surveyor on the other side, and therefore, though he did not so understand it, still I am entitled to enforce it as my strict legal right?"

One of two things is certain, either the Defendant, when he appointed *Tillott* to communicate with *Laws* and entered into the agreement of *October, 1861*, and when the works were going on, intended to make use of a power, to be acquired by the Plaintiffs' act, to derive an advantage which he did not otherwise possess, or he did not so intend. If he did so intend, it was his bounden duty to make that intention so clear and distinct to the Plaintiffs that it could not be misunderstood. If he did not so intend at that time, then the agreement and the acts of the parties shew, that the rights of both parties were to be left unaltered, and that neither was to acquire any advantage over the other, by reason of the works then contemplated.

The

The way Lord *Eldon* puts the case in *Dann v. Spurrier* (a) is this :—"I fully subscribe to the doctrine of the cases that have been cited, that this Court will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement; a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."

This case, I think, comes strictly within the rule so laid down, and that the Plaintiffs are accordingly entitled to a perpetual injunction against the Defendant.

(a) 7 *Ves.* 235.

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### MEADE KING v. WARREN.

1863.  
Jan. 13.

**I**N 1841, *John Clitsome* executed a voluntary settlement of certain sums presently mentioned, which he vested in trustees. This settlement recited that he was desirous of making a settlement of the sums after mentioned, in trust for himself for life, and after his decease, in trust for the benefit of his niece *Clara Catherine Warren*, and of his sisters *Catherine Clitsome*, *Susannah Elizabeth Clitsome* and *Harriet Warren*, and his great nieces *Jessie Louisa Warren*, *Catherine Emily Warry*

A voluntary settlement in favor of several persons contained a power authorizing the tenant for life (a volunteer) to revoke the trusts of the property and again resettle the same upon such trusts as to her should seem meet. Held,

that this general power could not be controlled, and that an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power.

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*Warry and Florence Annette Allen, and of John Woolcott Warren* in manner therein mentioned.

It then proceeded to declare the trusts, subject to his life estate; by which two sums of 2,000*l.* and 2,000*l.*, part of the funds, were to be held on certain trusts, and the deed proceeded as follows:—And as to one or the first moiety of and in the residue of the sum of 14,350*l.*, and one moiety of the sums of 1,600*l.* and 600*l.* (hereinafter called the residuary trust moneys, stocks, funds and securities), in trust to pay one-third of the annual income thereof to each of them the said *C. Clitsome* [since deceased] and *S. E. Clitsome* [since deceased], for their respective lives, and subject thereto, to pay the annual income thereof to his niece *C. C. Warren* during her life, if she should so long continue unmarried; and in case of her marriage, to be paid to her for her separate use, and in the event of her marrying and afterwards becoming a widow, the capital to be in trust for her *C. C. Warren* absolutely. But in case *C. C. Warren* should marry and afterwards die in her husband's lifetime, or should not marry at all, then the capital to be held by the said trustees for the benefit of such person or persons as *C. C. Warren* by her will or codicil should appoint, and in default of appointment and in case of her marriage, in trust for her children, in equal shares, to be vested interests at twenty-one as to sons and at that age or marriage as to daughters, and in default of appointment and in case the Defendant *C. C. Warren* should not marry, upon such trusts for the benefit of the settlor's three great nieces as should correspond with the trusts of the first-mentioned sum of 2,000*l.*

And as to the other or second and remaining moiety of and in the residue of the said sum of 14,350*l.*, and of

of and in the said sums of 1,600*l.* and 600*l.*, in trust to pay one-third of the annual income thereof to each of them the said *C. Clitsome* (since deceased) and *S. E. Clitsome* (since deceased) for their respective lives, and subject thereto, to pay the annual income thereof to *C. C. Warren* during her life for her separate use. And after the decease of *C. C. Warren*, in trust for her child or children as she should by will or codicil appoint, and in default of appointment, for her children equally. But in case there should be no child of *C. C. Warren* who should acquire a vested interest, then the said trust fund should be held in trust for such person or persons as *C. C. Warren* by will or codicil should appoint, and in default of appointment, upon such trusts for the benefit of the settlor's three great nieces as should correspond with the trusts of the first-mentioned sum of 2,000*l.*

The settlement contained a power for *C. C. Warren* (after the decease of the settlor), she being then not married, with the consent in writing of her father and mother (*J. W. Warren* and *Harriet* his wife), or of either of them, by any deed or deeds by her, *C. C. Warren*, duly executed, with or without power of revocation and new appointment, *to revoke* and make void all and every or any of the trusts, powers, provisoies, agreements and declarations thereinbefore contained and declared of the second moiety of the said residuary trust moneys (except the trusts for the benefit of the settlor's two sisters), and by the same deed to declare, limit and appoint any other trusts, powers, &c., in the place of the trusts, powers, &c., so revoked, *for the benefit of any person or persons whomsoever* as to her should seem meet.

The settlement also contained a second power for *C. C. Warren*, in case she should survive the settlor and

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attain the age of forty-five years, or be then unmarried or a widow, by any deed, by her duly executed, *to revoke* and make void all or any of the trusts, powers, provisoies, agreements and declarations thereinbefore expressed or contained of or concerning the said residuary trust moneys (except the trusts for the benefit of the sisters), *and again to resettle the same* or any part or parts thereof, upon such trusts, to and for such intents and purposes, and with, under and subject to such powers, provisoies, agreements and declarations as to her should seem meet.

The settlor, *J. Clilsome*, died in 1843. His two sisters died, respectively, in 1845 and 1856.

In *January*, 1862, *C. C. Warren* attained the age of forty-five years, and she was still unmarried.

By a deed-poll, dated in *August*, 1862, *C. C. Warren*, in execution of her second power of revocation, revoked all the trusts, &c., of the deed of 1841, which preceded the power, and she declared that all the residuary moneys, &c., should thenceforth be held in trust for herself, for her own use and benefit, but so that, in the event of her marrying, it might be held for her separate use.

*C. C. Warren* having thereupon required the trustees to pay over the fund to her, this special case was framed for the opinion of the Court on the following points:—First. Whether the second power extended to the entirety of the funds; and secondly, whether *C. C. Warren* was entitled to appoint the funds to herself absolutely, and to require a transfer of them, or was bound to make a re-settlement in favor of the three great nieces.

Mr.

**Mr. Marten** for the Plaintiffs, the trustees.

**Mr. Selwyn** and **Mr. F. Webb** for **C. C. Warren**. This appointment is authorized by the power. This is the case of a mere voluntary settlement, and not, as in *Bristow v. Warde* (*a*), a question arising on marriage articles, executory in their nature, and which had been followed by a settlement correcting the unlimited nature of the power given to the husband. In that case, the only object was, to secure a provision for the wife and the issue of the marriage: it establishes no general rule. In a recent case, *Peover v. Hassel* (*b*), the same attempt was made to cut down a general power of appointment given to a husband. There, under a settlement of the wife's estate, a general power to appoint to any person or persons was given to the husband, if there should be children surviving both parents, before the limitation to children; a power in the same words was given to the wife in default of such children. Sir *W. P. Wood* held, that the words being plain, the husband's general power could not be limited.

In this case, the power is absolute and unlimited, and there is nothing which says, that in the re-settlement **C. C. Warren** is to be excluded. But if the power be limited, what are the limits and who are the persons in whose favor it is incumbent on the donee of the power to appoint the property?

**Mr. Baggallay** and **Mr. Townsend** for the three great nieces. The whole intent and object of this settlement and of the settlor was, to provide for the various members of his family whom he named, and that is expressly recited. It is inconceivable that, with such

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(*a*) 2 *Ves. jun.* 336.

(*b*) 1 *John. & H.* 341.

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an intention, the settlor should give the niece the power of wholly destroying it and taking the property absolutely. The authorities shew that such a power of appointment is not general, but that it is confined to the objects of the settlor's trusts; *Bristow v. Ward* (a). By the second power she must "again re-settle the same;" then in whose favor? plainly in favor of the objects of the settlement and of the settlor's bounty. The two powers when contrasted are in favor of that construction. Under the first, which related only to a moiety, she might, with the consent of her father and mother, appoint "for the benefit of any person or persons whomsoever;" but these words were purposely omitted in the second power, and under this, she is bound to make a re-settlement. An appointment in her own favor is not a *re-settlement*, on other trusts, intents and purposes, and subject to other powers, provisoies, &c. A re-settlement contemplates a more extended alteration in the same trusts, some elaboration of details, and not a single appointment in favor of one individual absolutely.

#### *The Master of the Rolls.*

I concur in the argument in favor of the appointment, and I think that it is scarcely possible to raise the question.

Here a power is given to this lady in case she survived the settlor and attained forty-five, (which is a condition precedent and has been performed,) to revoke all the trusts, &c., of the deed of 1841, and to re-settle the property upon such trusts "as to her should seem meet." It seems meet to her to appoint it to herself, and she

(a) 1 *Ves. jun.* 347.

she revokes the existing trusts and appoints it to herself accordingly. It is impossible to say that this is not within the power. If every other species of limitation and trust is within it, why is she to exclude herself?

1863.  
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MEADE
KING
v.
WARREN.

The argument used against this execution of the second power of revocation might be equally applied to the first, by which she might appoint "for the benefit of any person or persons whomsoever." The Court would be making a new settlement if it introduced arbitrarily some limit in this general power. The scope of the instrument also seems to me to shew that what is expressed was purposely intended.

I must declare accordingly.

LAURIE v. CRUSH.

Jan. 17.

THIS was a motion, under the 15 & 16 Vict. c. 86, s. 52, for an order to revive the suit under the following circumstances:—This was a mortgagees' suit and was instituted in 1859, and a decree obtained in August in the same year. In December, 1861, the Plaintiff, Sir Peter Laurie, died, having devised the mortgaged estate to his nephew, Northall Laurie.

A sole Plaintiff died having devised the estate, which was the subject of the suit. Held, that the devisee was not entitled to the common order to revive under the 15 & 16 Vict. c. 86, s. 52.

Mr. G. N. Colt, for the devisee, in support of the application, said there was a difference of opinion in the other Courts as to whether such an order was, under these circumstances, proper, or whether a bill must be filed. That the Vice-Chancellor Wood in *Dendy v. Dendy* (a), and the Vice-Chancellor Kindersley in *Wil-*

liams

(a) 5 W. R. 221.

1863.

Hales
v.
Cox.

the mortgaged property which was not comprised in the settlement applied, in the first place, to pay the mortgages, so far as it would extend, so as to leave the settled property free and absolutely discharged from the mortgages, so far as the same affected their interests therein.

The several claims were submitted to the judgment of the Court.

Mr. *Lloyd* and Mr. *Bird* for the Plaintiff, the sole residuary legatee.

Mr. *Baggallay* and Mr. *Roberts* for the executors and trustees.

Mr. *Hobhouse* and Mr. *Rogers* for one of the four children.

Mr. *Druce* for the assignee.

Mr. *Lloyd* in reply.

The Master of the Rolls.

The view I take is this :—It is clear that the persons who take under the voluntary settlement would, as regards the subsequent mortgages, only take the property subject to those mortgages; but the mortgages ought, by marshalling, to be thrown as much, as possible, on the unsettled property, so as to liberate the settled property from the mortgage.

If, by these means, the settled property will not be altogether freed from the mortgages, then I think that the persons who are entitled to the benefit of the covenants

nants for quiet enjoyment, contained in the settlement of 1829, have a right to prove, against the assets of the settlor, for the amount to which they have been damaged by reason of his subsequently mortgaging the settled property ; that is, after providing for the testator's debts, they are entitled to priority over the legatees.

1863.



HALES

v.

COX.

But it appears that in 1841, *T. H. Hales*, one of the four children, became bankrupt and his share was sold to the settlor, who afterwards created the mortgages. As he had then a right to dispose of that share as he thought fit, I think that the persons, who claim under the subsequent settlement of 1847, are not entitled to the benefit of the covenants in the deed of 1829 ; they can only have that to which the testator was entitled in 1847, which is, the one-fourth diminished by its proportion of the mortgages.

Mr. Hobhouse. Your Honor declares these two principles :—that the claimants under the voluntary settlement are entitled, as against the testator, his heirs and devisees, to marshal the securities, and they are also entitled, as against the legatees, to prove under the covenant.

The MASTER of the ROLLS. Yes, as against his assets.

1863.



Jan. 31.
Feb. 10.

The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will.

The word "survivors" of nieces construed "others," in consequence of the gift over and of the subsequent part of the will referring to the "issue" of a deceased niece participating in an accrued share.

The case of *Wilmot v. Wilmot* (8 Ves. 10) is not overruled by *Winterton v. Crawford* (1 Russ. & Myl. 407).

In re KEEP'S WILL.

THE testator, by his will made in 1834, gave his residuary estate to trustees, upon trusts which he declared in the words following :—

"In trust, as to the ten eleventh parts, thereof for all and every my nieces" *Jane Barton* and nine others (naming them), "during their respective lives in equal shares," but for their separate use; "and after the decease of each of my said nieces, my trustees shall stand possessed of the share to which the niece so dying shall become entitled during her life, as aforesaid, in trust for all and every her children, who being a son or sons shall attain twenty-one, or being a daughter or daughters shall attain that age or previously marry, to be divided between the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one child. And in case and so often as any of my said nieces shall die without leaving any child who shall become entitled under the trusts aforesaid, then and in every such case, and so often as the same shall happen, my said trustees shall stand possessed of the share to which such niece for the time being dying without leaving such child, as aforesaid, shall become entitled during her life, as well originally under the trusts aforesaid as by survivorship under this present clause, in trust for the survivors or survivor of my said nieces during her or their respective life or lives, and in equal shares, if more than one," but for their separate use; and after the decease of each of such survivors, my trustees shall be possessed of the accruing share to which such survivor for the time being shall become

become entitled for her life under the trusts aforesaid, in trust for all and every her children and child, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or previously marry, to be divided amongst the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one or only child. And in case all my said nieces should die without leaving any child who shall become entitled to the said trust moneys and premises, under the trusts aforesaid, then my trustees shall stand possessed of the same, and the interest, dividends and annual produce thereof, in trust for the person who would have been entitled to my personal estate at my decease if I had died intestate."

1863.

In re
KEEP'S WILL.

The will then contained provisions for the application of the income of a share to which any niece would be entitled for her maintenance and for raising any part not exceeding one-half of the presumptive share of such niece for her advancement.

The trusts of the remaining one-eleventh share of the residuary estate were declared as follows :—" And my will is, that my said trustees shall stand possessed of the remaining one-eleventh part of my said residuary estate, in trust for *Edward Tubb* during his life, and after his decease, in trust for all and every the children of my late niece *Sarah Tubb*, deceased, by her husband the said *Edward Tubb*, who being a son or sons shall attain twenty-one, or being a daughter or daughters shall attain that age or previously marry, to be divided between them, if more than one, in equal shares, and if but one, then the whole to be in trust for that one. And in case there shall be no such child who shall live to become entitled, then my trustees shall stand possessed

of

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In re
KEEP's WILL.

of the same, in trust for my said other nieces and their issue, or of my next of kin, in the same manner as is before by me provided with regard to their original shares. And it is my will that, notwithstanding anything before to the contrary, the children of my niece *Sarah Tubb* shall be entitled to share in the division of any of the share and shares before provided for my said other nieces, which may happen to accrue by survivorship, and in such division to take amongst the whole of them the same share as a niece or the issue of a deceased niece would be entitled to receive. And my will is, that my said trustees shall have the same powers as to maintenance and advancement of the children of my said deceased niece *Sarah Tubb* as are provided for the children of my said other nieces."

The testator died in 1855.

Prior to *August*, 1861, six of the ten nieces and *Edward Tubb* had died leaving children.

Jane Barton (whose share was now in controversy and had been paid into Court), died in *August*, 1861, a spinster. Three of the nieces were still living.

The question was, whether the word "survivors" was to be read "others," so as to let in the children of those who had predeceased *Jane Barton* to participate in her share (£2,034 Consols).

Mr. *J. H. Palmer* and Mr. *Dewsnap* for the four Petitioners, who were children of nieces who had predeceased *Jane Barton*. The gift over to the next of kin, if all the nieces should die without leaving any child, shews that by the word "survivors" the testator meant "others." The effect of holding otherwise would

would be to exclude the children of the niece who predeceased one dying without issue, and yet the gift over would not take effect. It is clear from the limitations of the last eleventh share that the testator intended that the issue of a deceased niece should participate. They referred to *Jarman on Wills* (*a*) ; *Lowe v. Land* (*b*) ; *Leeming v. Sherratt* (*c*) ; *Holland v. Allsop* (*d*) ; *Hawkins v. Hamerton* (*e*) ; *Smith v. Osborne* (*f*).

1863.

In re

KEEP'S WILL.

Mr. Hobhouse for the other persons in the same interest as the Petitioners. It is one of the commonest errors in wills to use the word "survivors" for "others." Here the testator was most anxious to put the various stocks of his eleven nieces on an equality; the fact of one being dead created a difficulty in framing a gift contained in one clause. The gift over in mass shews that no part was to go over while there existed children of any niece, for otherwise there would be an intestacy, for it could not go to the stocks whose mother predeceased the one dying without children, nor could it pass under the ultimate limitation, because the event had not happened. The case is governed by *Wilmot v. Wilmot* (*g*).

Mr. Dunning for the children of nieces and for Sarah Trimmer, one of the three nieces still living.

Mr. Southgate and Mr. Dickinson for nieces who were still living. The word "survivors" must, according to the modern doctrine, be strictly construed, as in *Winterton v. Crawfurd* (*h*). Here ten-elevenths and not the whole is given to the nieces for life, and the gift

(*a*) Vol. 2, p. 587 (2nd edit.)

(*b*) 6 L. J. (Ch.) 234.

(*c*) 2 Hare, 14.

(*d*) 29 Beau. 498.

(*e*) 16 Sim. 410, 421.

(*f*) 6 H. of L. Cas. 393.

(*g*) 8 Ves. 10.

(*h*) 1 Russ. & Myl. 407.

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KEEP's WILL.

gift over being to the next of kin is the same as an intestacy, and as if that limitation had been omitted; *Aiton v. Brooks* (a).

The MASTER of the ROLLS.

My impression is very strong that the gift over and the reference to the share of *Sarah Tubb's* children shew that "survivors" must be construed "others." The testator there speaks "of a niece or the issue of a deceased niece" being entitled to an accrued share, and such issue could only take by "survivors" being construed "others."

The MASTER of the ROLLS.

Feb. 10.

The question which arises on the construction of this will is that which has so often come before the Court, viz., whether the word "survivors" is to be read "others." There is no question but that the rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will, and that the burthen of proof lies on those, who contend for a different construction, to shew, from the words of the will, taken together, that the true meaning of the word, as used by the testator, is "others," and not "survivors."

The words of the will are these [see *ante*, p. 122]. I think that the gift over here, coupled with what is afterwards

(a) 7 Sim. 204.

afterwards stated in the will, requires that in this case the word "*survivors*" should be read "*others*."

1863.

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In re
KEEP's WILL.

This matter came before Lord *Eldon* in *Wilmet v. Wilmet* (a), in a will where a similar gift over occurred, in which Lord *Eldon* observed:—"It must be argued that the word 'surviving' means the same as 'other' or living at the age aforesaid. In the clause in which the gift over is made, it was never meant that any portion should be taken. It was to be either the whole or none. There is a number of authorities for construing the word 'surviving' to mean 'other.' I think they are right in contending that this vested."

This applies strictly to the present case; here the gift over is not to take effect unless all his nieces die without leaving any child. Unless, therefore, the word "*survivors*" is to be read "*others*" this result must follow:—in the event of two or three nieces dying without leaving a child, their shares would be undisposed of by the testator's will.

It is endeavoured to get over the effect of this, first, by pointing out that the gift over is to the testator's next of kin according to the Statute of Distributions, and that, consequently, the identical persons would take the shares lapsed by the death of the niece without children, as those who would take the whole in case the gift over took effect. But I am of opinion that this circumstance cannot properly affect the construction to be placed on the testator's will. It would be much too fine a distinction to hold, that if the gift over had been to *A. B.* absolutely, the word "*survivors*" must be read "*others*"; but that it is not to have the same meaning, if the legatees in the gift over are the next of kin.

(a) 8 *Ves.* 11.

1863.

In re
KEEP's WILL.

kin. It would, in my opinion, be a very unusual mode of construing a will so to hold, and if it became prevalent, would fritter away established principles of construction.

The other ground which is relied on and urged as an argument for the strict reading of the word "survivors" is, that the case of *Wilmot v. Wilmot* is not now to be relied upon, by reason that the matter was fully considered and otherwise decided by Sir John Leach in the case of *Winterton v. Crawfurd* (a), where he observes:—"In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention, and the survivors are to take as tenants in common for life, for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that in the gift over, after the death of the surviving daughter, to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters, and this intention would be defeated if, upon the death of Lady *Winterton* without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady *Winterton*'s life, and all that can now be done is, to declare that Lady *Winterton* is entitled for life, to her separate use, to the one-third share of the real

(a) 1 R. & M. 411.

real estate, which by the will was given to her sister *Louisa Moreton.*"

1863.

In re
KEEP'S WILL.

A careful consideration of the cases leads me to an opposite conclusion; I think that the case of *Wilmot v. Wilmot* is not overruled by *Winterton v. Crawfurd*, and that if they cannot subsist together, that the case of *Winterton v. Crawfurd* cannot be relied upon. It may be doubted whether, in that case, it was intended to decide this question; for it is to be remarked, that Sir *John Leach* stated, that he considered the question arising on the gift over was not then ripe for decision, and the case of *Wilmot v. Wilmot* was not brought to his attention; and in addition to which, if it be considered as determining this matter, it has been questioned, or at least it has certainly not been followed in later cases, of which *Smith v. Osborne*(a), *Hawkins v. Hamerton*(b), may be cited as examples. I also, in the case of *Holland v. Allsop*(c), where I considered the authorities on this point, thought myself bound by the later authorities, and I was compelled to disregard the decision of Sir *John Leach* in *Winterton v. Crawfurd*, and to follow the principle laid down by Lord *Eldon* in *Wilmot v. Wilmot*.

There is, besides the gift over, another circumstance in this will which confirms me in the view I take of the construction to be put on the word "survivors" in this will; and this is, the manner in which the testator disposes of the remaining one-eleventh share in his residuary estate. Here the words "*or the issue of a deceased niece*" plainly shew that he considered that the issue of a deceased niece might, in some event, take a part

(a) 6 H. of L. Cas. 375.
(b) 16 Sim. 410.

(c) 29 Beav. 498.

1863.

*In re
Keeper's Will.*

part of an accruing share. But to enable the children of a deceased niece to do so, it is obvious that the word "survivors" must be read "others;" for if one niece died first leaving children, and then a second niece died leaving no issue, if the word "survivors" is to be construed strictly, the child of the deceased niece could take nothing, while the children of a surviving niece obviously took nothing while their mother was alive.

In every view of this will, therefore, adhering rigidly to the rule that the word "survivors" is to be construed strictly, when it is possible to do so, I am of opinion it is not possible to do so here, and that the testator has plainly expressed his opinion that the word "survivors" here means "the other nieces," amongst whom he had divided the ten-elevenths of his residue.

I will make a declaration accordingly.

GIBBONS v. SNAPE.

Feb. 10.

IN this case, *The Master of the Rolls*, adhering to his decision in *Honeywood v. Foster* (No. 1.) (a), held, that in order to bar an equitable estate tail in copyholds by deed, under the 3 & 4 Will. 4, c. 74, such deed must be entered on the court rolls within six months after its execution.

Mr. Swanston, Mr. Hobhouse, Mr. Townsend and Mr. Villiers for different parties.

Upon appeal, the Lords Justices on the 28th of July, 1863, affirmed the decision.

(a) 30 Beav. 1.

1863.

FOLIGNO'S MORTGAGE.

Feb. 16.

GILBERT Brandon and *Lionel Brandon* were each entitled to one-fifth of a sum of 7,305*l.* 9*s.* 6*d.* in reversion expectant on the death of their parents.

In 1844, *Gilbert* and *Lionel* conveyed these two-fifths to *Foligno* by way of mortgage to secure the repayment of 1,000*l.* The mortgage empowered the mortgagee to sell and to hold the produce "upon trust" to pay the costs and the mortgage, and to pay the surplus to *Gilbert* and *Lionel Brandon*, or as they should respectively direct.

In this transaction *Lionel* was a mere surety for *Gilbert*, who received the whole money borrowed.

In 1848, *Gilbert* by deed covenanted to save harmless and indemnify *Lionel* and his share in the fund from the mortgage; and *Gilbert* thereby assigned his one-fifth to *Lionel* to indemnify him and his one-fifth. And it was declared, that if the mortgage should be enforced against *Lionel* or his share, then that *Lionel* might sell *Gilbert's* share, and that he might stand possessed of the share of the moneys to arise from such sale in trust for his indemnity. And it was declared that the receipt of *Lionel* and his executors and administrators for the share so assigned, or the moneys to arise from such sale, should be good discharges.

Trustees, who had, without sufficient reason, paid a trust fund into Court under the Trustee Relief Act, were ordered to pay the costs of a petition for its payment to the party entitled.

A. and *B.*, being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. *B.* was a mere surety for *A.*, and *A.* afterwards assigned his share to *B.* for his indemnity, with a power to sell and to give receipts for the share and the produce of the sale. The mortgagees sold the reversionary interest, and refused to pay the surplus to *B.* without the concurrence and release of *A.*, and they

paid the fund into Court under the Trustee Relief Act. Held, that this was improper, and they were ordered to pay the costs of a petition to get the money out of Court.

1863.

*In re
FOLIGNO'S
MORTGAGE.*

In *October*, 1862, the executors of the mortgagee sold the two shares by auction for 1,655*l.*, and after payment of the expenses of the sale and the amount due on the mortgage, there remained a sum of between 400*l.* and 500*l.* in their hands.

The administrator of *Lionel* (who had died in 1855), applied to the executors of *Foligno* for the balance, but they refused to pay it without the concurrence of *Gilbert* (who was resident in *Lima*), evidenced by his execution of a release by attorney. After some correspondence, the executors paid the balance (403*l.*) into Court, under the Trustee Relief Act, after deducting costs amounting to 52*l.*

The administrator of *Lionel* presented a petition for payment to him out of Court of the fund. The only question was, as to the costs of this petition.

Mr. *Selwyn* and Mr. *Jessel*, in support of the petition, argued that the mortgagees, after payment of the amount of their mortgage, were bound to pay the balance to the Petitioners even without a release, and that the payment into Court was so vexatious that the Respondents ought to pay the costs. They cited *In re Waring* (*a*) ; *Re Woodburn's Trusts* (*b*) ; *In re Cater's Trust* (*c*) ; *In re Knight's Trusts* (*d*) ; and see *Wyllly's Trusts* (*e*) ; *Re Brocklesby* (*f*).

Mr. *Waley contra*, argued that the Respondents had acted *bond fide*, and that there was a well founded doubt as to whether the fund could be safely paid over without the concurrence of *Gilbert*. That by the express terms of the mortgage deed, the mortgagee was bound to pay over the surplus to *Gilbert* and *Lionel*, and that it was

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- (*a*) 21 *L. J. (Ch.)* 784.
- (*b*) 1 *De G. & J.* 333.
- (*c*) 25 *Beav.* 361—366.

- (*d*) 27 *Beav.* 45.
- (*e*) 28 *Beav.* 458.
- (*f*) 29 *Beav.* 652.

by a subsequent deed, to which the mortgagee was no party, that these rights had been altered. That the deed of 1848 contained no power to give receipts for the surplus produce of a sale by the mortgagees, but only for the share itself and the produce of a sale by *Lionel* and his representatives of *Gilbert's* share. That the mortgagees were therefore entitled to a release and discharge both from *Gilbert* and *Lionel*. That all that *Lionel* could require was the payment of his one-fifth share on the death of the tenant for life, and that therefore the surplus produce of the sale ought to be invested and accumulated to wait the event of the reversion falling into possession, before which the failure of any part of his share could not be ascertained.

1863.
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*In re*  
 FOLIGNO'S  
 MORTGAGE.

### *The Master of the Rolls.*

I am of opinion that the trustees were not justified in paying this money into Court. I think that the point raised at the bar does not arise here, and that it does not lie in the mouth of mortgagees, after a sale, to raise this question. There is nothing more in it than this:— two reversionary sums of stock, amounting together to above 2,900*l.*, were mortgaged by two persons who were entitled to them in equal moieties. The mortgage contained a power of sale. The mortgage money, amounting to 1,000*l.*, was raised for the benefit of one, the other being a mere surety. *Gilbert*, who received the money, executed a deed, by which he assigned his one-fifth to *Lionel* for his indemnity, with a power to sell it and to give receipts. After that, the mortgagees sell, and having a balance of 400*l.* in hand, after paying what was due on the mortgage, they say “we will not pay the balance to *Lionel's* representative without the concurrence of and a release from *Gilbert*.” In no possible way in which I can look at this matter can I

1863.

*In re*  
FOLIANO's  
MORTGAGE.

see anything to justify this refusal ; the mortgagees were not bound to see the surplus invested and accumulated until the death of the tenant for life at compound interest.

The property mortgaged was a reversion, and as soon as it had been sold, the balance, after satisfying the mortgage, was a present debt due to the mortgagors, one of whom was a mere surety for the other, who had received the whole money and who had assigned the whole of his interest to the other for his indemnity. I think that the Respondents were entitled to no more than the production of the deed and a receipt for the money, and that they were not justified in paying the fund into Court, and trying to raise questions and equities in which they had no concern, and which could scarcely be sustained in any case. It was also next to impossible, considering the age of the tenant for life, that the surplus, if accumulated, could ever have amounted to the 1,461*l.* to which *Lionel* eventually would have become entitled, in case he had not joined in *Gilbert's* mortgage.

The pressure applied by trustees in these cases is very great, and the power of paying trust funds into Court has been, in many cases, used as the means of extorting costs. I have no doubt that these Respondents acted *bona fide*, but it is essential that the Court should put an end to such cases. The rights of the parties would be the same if a bill had been filed. If the trustees had said "we will not pay over the balance until we have the concurrence and release of *Gilbert*," and a bill had been filed to compel them, I should have ordered them to pay the costs of the suit. They are as much liable on a petition as in a suit.

I am of opinion that the trustees must pay the costs of this petition.

1863.

*Re LEAKE'S TRUSTS.*

Feb. 14, 16, 17.

THE testator directed his executors, *William Wing* and *Zachariah Watkins*, to invest 1,100*l.* in Consols, and stand possessed thereof upon trusts declared in the words following:—"To empower *Charlotte Hitchon* to receive the annual produce of the same sum of 1,100*l.* or the investment thereof during her life, and after her decease, then as to as well the capital as the annual produce thenceforth to become due, in trust for my nephews and nieces" (naming seven of them), "or such of my said nephews and nieces as shall be living at my death, and the issue of such of them as shall be then dead leaving issue, equally to be divided between them if more than one, the issue of such of them as shall be then dead to take the shares which their respective parents would have taken if then living. But I declare, that if, during the life of the said *Charlotte Hitchon*, the said annual produce or any part thereof shall, by any means whatever, vest in or become payable to any other person or persons than the said *Charlotte Hitchon*, then the trust hereinbefore contained in her favor shall, as to the annual produce which shall so vest in or become payable to any person or persons, thenceforth absolutely cease, and the same annual produce shall, during the remainder of her life, be applied in the same manner as the same would be applicable if she were dead."

Trustees who, after accepting the trust, had paid the trust fund into Court without sufficient reason, refused their costs of an application to pay the income to the tenant for life.

A fund was held in trust for *A.*, an unmarried lady, for life, but to cease if "by any means whatever" it should vest or become payable to any other person.

*A.* afterwards married, and her life interest was settled to her separate use, without power of anticipation, by a settlement to which the trustees purported to be parties, but to which they never assented. The trustees

The thereupon paid the trust fund

into Court under the Trustee Relief Act. Held, that as the trusts which they had accepted had not been varied either by the marriage or the settlement, they were not justified in paying the money into Court, and they were refused their costs of appearing on a petition for payment of the income to the tenant for life.

Costs of a petition by a tenant for life to obtain the income of a fund, paid into Court under the Trustee Relief Act, ordered to be paid out of the corpus.

1863.

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Re
LEAKE's
TRUSTS.

The testator died on the 15th of *December*, 1860, and the legacy was duly set apart and invested by his executors.

On the 19th of *May*, 1862, *Charlotte Hitchon* married *Edward Coundley*, and by a marriage settlement, dated the 6th of *May*, 1862, and purporting to be made between them and the two executors, it was declared and directed, that the trustees of the will should pay the dividends of the legacy to *Charlotte Hitchon* for her separate use, without power of anticipation. This deed was executed without the concurrence of the executors, but notice of and a copy of it were given to them on the 26th of *May*, 1862.

On the 21st of *November*, 1862, the executors paid the fund into Court under the Trustee Relief Act, *minus* about 17*l.* stock, which they had sold out to pay the costs. Their affidavit stated, that they had not been consulted with reference to the settlement, that they had been made parties thereto without their consent, and that they were unwilling to act as trustees.

Charlotte Coundley now presented a petition, praying that the executors might be ordered to transfer the 17*l.* retained for costs into Court, that the dividends of the trust fund might be paid to her for life, and that the costs of the Petitioner and all other parties might be paid by the executors.

Mr. *Selwyn* and Mr. *Caldecott*, in support of the petition, argued that there was no reasonable doubt that the settlement had not affected the right of the Plaintiff to the dividends. That, in effect, it merely excluded the marital right, and thereby prevented the forfeiture by reason of the legacy becoming, "by any means whatever vested

vested in or payable to any other person" than the Petitioner. That the condition did not apply to a change in the ownership consequent on a marriage; *Bonfield v. Hassall* (*a*) ; and that if it did, then that such a condition in restraint of marriage was simply void; *Newton v. Marsden* (*b*). That the payment into Court was improper and vexatious, and that the executors ought therefore to pay the costs; *Knight's Trusts* (*c*) ; *Woodburn's Trusts* (*d*).

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LEAKE'S
TRUSTS.

The Master of the Rolls.

I cannot make the trustees pay the costs. Trustees are not bound to accept a trust, but after undertaking it can they pay the fund into Court and call on the Court to perform it, and that in a case where there is a simple gift to one for life and afterwards to other named persons? Again, were the trustees entitled to deduct anything from the legacy? Ought not the costs to have been paid out of the general estate of the testator?

Mr. Baggallay and Mr. Speed for the trustees. The fund was severed, and, after that, all subsequent costs relating to it were properly payable out of the legacy itself; *Jenour v. Jenour* (*e*).

The trustees acted *bona fide* and were justified in paying the fund into Court. They objected to be trustees for a married woman and to be mixed up with the subsequent settlement, to which they had been made parties without their consent.

[*The Master of the Rolls.* But was it not a mere act

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| (a) | <i>Post.</i> | (d) 1 <i>De G. & J.</i> 333. |
| (b) | 2 <i>John & Hem.</i> 366. | (e) 10 <i>Ves.</i> 562. |
| (c) | 27 <i>Beav.</i> 45. | |

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act of caprice and vexation to throw up the trusts after six months ?]

Here a new state of circumstances had arisen, the *status* of the lady had become altered by a new deed executed, and there was sufficient doubt as to the effect of the marriage and of the deed to justify the trustees paying the fund into Court; *Re Wylly's Trusts* (a); *Williams's Settlement* (b); *Re Feltham* (c).

Mr. Selwyn, in reply, referred to *Greenwood v. Wakeford* (d); and see *Howard v. Rhodes* (e); *Coventry v. Coventry* (f), and *Courtenay v. Courtenay* (g).

The MASTER of the ROLLS.

Feb. 16.

I cannot give the trustees their costs of this petition. They were entitled, when they opened the will, to say "this is a trust of a very peculiar nature and of a very singular description, not such a one as we will take upon ourselves to perform." They might then have paid the fund into Court or have caused the trusts of the will to be administered; but in that case the legacy would not have been severed, and the costs would then have fallen on the residue. They did not take that course, but they adopted one which was quite inconsistent with it. They severed the fund and accepted the trust, and this they did in November or December, 1861, the period is not very material. About six months after this, this lady marries, and I do not find that the situation of the trustees

- (a) 28 Beav. 458.
- (b) 4 Kay & J. 87.
- (c) 1 Kay & J. 528.
- (d) 1 Beav. 576.

- (e) 1 Keen, 581.
- (f) 1 Keen, 758.
- (g) 3 J. & L. 529.

trustees was in any way varied, or that their responsibilities were in any way increased ; if they had been, I should then have said that they might have taken the course they did. But it is impossible to adopt the argument that this declaration of forfeiture was intended to be in restraint of marriage, or that the legatee could not marry at all, and the argument has not even been pressed to that extent.

The only additional thing is this :—on the marriage the husband, in order to secure the life interest from forfeiture, agreed that he should not take any interest in it and that the trust in the lady's favor should remain the same as it was : and it is the same, for it is held for her separate use without power of anticipation. The settlement is inoperative to alter the trusts, for the will overrides it ; and all that the settlement did was this :—the husband says “ I will not interfere with the trusts of the will, and in consideration of the marriage, my wife shall have the legacy for her separate use without power of anticipation.” I think that the trusts remain the same, though the husband and wife ought to have informed the trustees that they proposed to make them parties to the settlement.

I think that the trustees were not justified in saying “ we will throw up the trust which we accepted twelve months before.” I shall not make them pay the costs, but I think their situation is similar to that, where a trustee, without sufficient reason, gives up his trust, as in the case before Lord *Langdale*, and in such cases he cannot have his costs.

I must order the dividends to be paid on the lady's separate receipt for life, or until further order, with liberty to apply. The costs of the petition must be paid out of her income.

Mr.

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Mr. Selwyn asked that the costs might be paid out of the corpus ; *Re Hadland's Settlement* (a) ; and see *In re Hamersley's Settlement* (b).

The Master of the Rolls. I will reconsider the question as to the costs of the petition.

The Master of the Rolls.

Feb. 17.

You may have the costs out of the corpus ; I find it is a course I have adopted on former occasions. The fund is secured for the benefit of the persons entitled in remainder.

(a) 23 Beav. 266.

(b) 23 Beav. 267.

VACHELL v. ROBERTS.

Feb. 19.

Devises of residue of real and personal estate on trust to permit A. B. to "receive and take the rents, issues and profits" for life, with remainder over. Held, that A. B. was entitled to enjoy leaseholds and railway stock in specie.

THE testator, by his will, expressed himself as follows :—

"I give, devise and bequeath unto Charles Redwood Vachell, of Cardiff, doctor of medicine (the Plaintiff), all my real and personal estate, whatsoever and wheresoever, upon trust to hold and stand possessed of the same and every part thereof for the absolute use and benefit of my daughter Maria Williams. And I direct, that in case my said daughter shall marry, that devise and bequest shall be to her sole and separate use, independently and exclusively of her husband, and without being in anywise subject to his debts, control or interference; and in the event of my said daughter dying in the lifetime of her husband (if any), it shall be lawful for him to receive the profits or income of my said

said real and personal estate for and during his life, and if there shall be issue of such marriage, I direct that my said real and personal estate shall be for their benefit absolutely, in equal shares and proportions. But if my said daughter shall die without leaving any child or children her surviving, then my will is, that after the determination of the life interest so given as aforesaid to the husband (if any) of my said daughter, in the event of his surviving her, the whole of my said real and personal estate be equally divided amongst such of my next of kin as shall then be living. And upon trust to permit my said daughter to receive and take the *rents, issues and profits* of the said real and personal estate during the continuance of her estate therein." "And all the residue of my estate I give, devise and bequeath unto the said *C. R. Vachell*, his heirs, executors, administrators and assigns upon the trusts aforesaid."

The testator died in 1858, possessed of a freehold tenement, a leasehold house and some stock in the *Taff Vale Railway Company*, yielding a dividend of *8l. per cent.*

The testator's daughter married *Mr. Roberts*, and they had three children.

The trustee instituted this suit, to have it determined whether the tenant for life was entitled to enjoy the property *in specie* or whether it ought to be converted.

Mr. Gordon Whitbread for the Plaintiff.

Mr. Selwyn and *Mr. Roberts*, for the tenant for life, argued that she was entitled to enjoy the whole real and

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and personal estate *in specie*; *Goodenough v. Tremamondo* (a); *Crowe v. Crisford* (b); *Alcock v. Sloper* (c).

Mr. Lewis, for the children, argued that there ought to be a conversion; *Thornton v. Ellis* (d); *Howe v. Lord Dartmouth* (e).

The MASTER of the ROLLS.

The word “rents” being used, I think that I must follow the authorities cited. Where there is both freehold and personal estate the expression “rents” would refer to and include leaseholds as well as freeholds; the words “issues and profits” seem to point to the *Taff Vale Railway* stock.

I will make a declaration that the trustees are not bound to convert.

(a) 2 *Beav.* 512.
(b) 17 *Beav.* 507.
(c) 2 *Myl. & K.* 699.

(d) 15 *Beav.* 193.
(e) 7 *Ves.* 137.

Re THE PATENT SCREWED BOOT AND SHOE COMPANY.

Jan. 12.

The four days, within which the affidavit in support of a petition to wind-up must be sworn and filed, extended by the Court.

THE 4th of the General Orders of the 11th November, 1862, made under the Companies Act, 1862, directs, that the affidavit verifying the petition for winding-up any company “shall be sworn after and filed within four days after the petition is presented.” In this case the petition for winding-up the company had been presented on the 5th of January. It had been duly served upon the parties interested in the company, the necessary advertisements had been inserted in the papers, and the petition stood for hearing on the 17th of January.

But

But, in consequence of the absence of the Petitioner in the country, the affidavit verifying the petition was not sworn until the 10th of January.

Mr. Roxburgh now applied for leave to file the affidavit, notwithstanding the four days had expired. See the 73rd Order of 11th November, 1862.

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Re
THE
PATENT
SCREWED
BOOT AND
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COMPANY.

The Master of the Rolls.

You may take the order, but you must send a copy of the affidavit forthwith to the Respondents.

Note.—See the Western Benefit Building Society (M.R., 19th January, 1864), post.

SHOVELTON v. SHOVELTON.

Jan. 12.

THE testator, by his will, gave as follows:—

"I bequeath unto my dear wife Anne, all my household goods, furniture, books and other effects, and all the ready money of which I may be possessed, together with all moneys due to me from the funds of the Wesleyan connection, and all moneys assured to me by my policy in the *Star Life Assurance Society*, for her own absolute use and benefit, she paying thereout all my just debts and funeral and testamentary expenses. I bequeath unto each of my daughters the legacy of 300*l.* a-piece, to be paid to them on and when they shall respectively attain the age of twenty-one years. And subject thereto, I bequeath all the rest and residue of my personal estate and effects, whatsoever and wheresoever, unto my said dear wife, to and for her own

A testator gave the residue of his personal estate to his wife, "for her own absolute use and benefit, in the fullest confidence that she would dispose of the same, for the benefit of her children, according to the best exercise of her judgment and as family circumstances might require at her hands." Held, that the widow was entitled for life, with a precatory trust in remainder in favor of her children.

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absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children, according to the best exercise of her judgment and as family circumstances may require at her hands." He appointed his wife, his brother and his nephew to be his executors.

Mr. *Bristowe*, for the children, argued that the widow took beneficially for her life, with remainder to her children as she should appoint, in the nature of a precatory trust; *Gully v. Cregoe* (*a*) ; *Wace v. Mallard* (*b*). He argued that as the executors had severed in their defences, only one set of costs ought to be allowed; *Attorney-General v. Wyville* (*c*).

Mr. *Walford* for two executors.

Mr. *Selwyn*, for the widow, argued that she took the residue absolutely, for that there was an unlimited gift to her in the first instance, followed by something which was too uncertain for the Court to act on. He cited *Fox v. Fox* (*d*) ; *Webb v. Wools* (*e*) ; *Palmer v. Simmons* (*f*).

The MASTER of the ROLLS.

I think that this is a precatory trust. I cannot get over the cases first cited. *Palmer v. Simons* and *Fox v. Fox* differ from this; the words were too ambiguous. In one case, the testatrix trusted that her nephew, to whom she gave her residue, would leave the "bulk" of it to certain persons. In the other, the donee was to make

- (*a*) 24 *Beav.* 185.
 (*b*) 21 *L. J. (Ch.)* 355.
 (*c*) 28 *Beav.* 464.

- (*d*) 27 *Beav.* 301.
 (*e*) 2 *Sim. (N. S.)* 267.
 (*f*) 2 *Drew.* 221.

make a "sufficient and judicious provision." If the words had been certain in those cases, there would, undoubtedly, have been a trust to carry into execution. I must come to the same conclusion as in *Wace v. Mallard* and *Gully v. Cregoe*, and make a declaration that there is a precatory trust in favor of the children after the widow's death. I will not now say how the residue is to be divided if she should not dispose of it.

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As to the costs, I cannot vary from the usual rule, as I see no reason for the executors severing, I can allow one set of costs only to the three executors.

1862.
Dec. 19.

SARAZIN v. HAMEL. (No. 1.)

1863.
Jan. 14.

THIS bill was filed by Messrs. Sarazin of Calais and Messrs. Gower of London, against Mr. Hamel, a lace manufacturer of Nottingham.

The bill alleged as follows:—

"The Plaintiffs, having become the joint proprietors of two original designs, applicable to the ornamenting of lace, which had not previously been published, either within the United Kingdom of Great Britain and Ireland or elsewhere, caused the same designs, respectively, and the Plaintiffs' proprietorship thereof, respectively, to be duly registered by the registrar of designs, at the times hereinafter mentioned, in pursuance of and in accordance

By the Copyright of Design Act (5 & 6 Vict. c. 100, s. 4), no person is to have the benefit of the act, unless every article has attached thereto the letters "Rd." A bill to prevent an infringement did not allege that this had been done. Held, that the bill was not, on that ground alone, open to a demurrer.

Whether, upon a bill to restrain the infringement of a patent, it is necessary to allege that the patentee has duly paid the instalments of stamp duties necessary to keep the patent alive, under the 16 & 17 Vict. c. 5, s. 2, quare?

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cordance with the provisions of the 5 & 6 Vict. c. 100,  
on the 12th of August, 1862."

"Such designs, and Plaintiffs' proprietorship thereof, having been respectively so registered, the Plaintiffs, in virtue of the said act, became, from the time of the registration thereof, respectively, entitled to the sole right of applying the same, for the term of twelve calendar months from the date of such registrations, respectively, to articles of manufacture comprised in the thirteenth class mentioned in the said Designs Copyright Act (that is to say):—To lace and any other article of manufacture or substance not comprised in either of the twelve other classes in the said act mentioned." It then alleged, that the Defendant had since, "without any leave or licence from Plaintiffs, and in violation of their rights and privileges, to which they are entitled by virtue of the said act in respect of such designs, and to their great wrong and damage, been applying the said designs to lace manufactured by himself," and had sold great quantities of lace so manufactured, and made large profits thereby.

The bill, however, contained no allegations that the Plaintiffs had affixed the letters "Rd" on every article of their manufacture.

The bill prayed an injunction, for the delivery up of the pirated articles, and that the Defendant might account to the Plaintiffs for the profits made by him, and compensate them for the damage they had sustained.

To this bill the Defendant put in a general demurrer for want of equity.

Mr.

Mr. *Selwyn* and Mr. *Freeling* in support of the demurrer. The Plaintiffs have not shewn, upon the face of their bill, that they are entitled to the benefit of the statute. Their right is created by statute, and the 4th section says, that they are not to have the benefit of it, *unless* certain acts be done, that is, unless the design be registered in the mode pointed out, and *unless* every article be marked "Rd" (a). The compliance with these conditions is an essential part of the Plaintiffs' title, and ought to be stated with precision (b). The Plaintiffs have not stated that they have marked every article "Rd," so as to bring themselves within the protection of the act, and therefore they cannot sue. According to the allegations in the bill, and which are to be taken most strongly against the Plaintiffs, they have "duly registered," but not duly marked the articles; *Heywood v. Potter* (c); 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73.

Mr.

(a) The 5 & 6 Vict. c. 100, s. 4, is as follows:—"Provided always, and be it enacted, that no person shall be entitled to the benefit of this act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture, or any such substance, *unless* such design have, before publication thereof, been registered according to this act, and *unless*, at the time of such registration, such design have been registered in respect of the application thereof to some or one of the articles of manufacture or substances comprised in the above-mentioned classes, by specifying the number of the class in respect of which such registration is made, and *unless* the name of such person shall be registered, according to this act, as a proprietor of such design, and *unless*, after publication of such design, every such article of manufacture or such substance

to which the same shall be so applied, published by him, hath thereon, if the article of manufacture be a woven fabric for printing, at one end thereof, or if of any other kind or such substance as aforesaid, at the end or edge thereof, or other convenient place thereon, the letters "Rd," together with such number or letter, or number and letter and in such form as shall correspond with the date of the registration of such design, according to the registry of designs in that behalf; and such marks may be put on any such article of manufacture or such substance, either by marking the same in or on the material itself of which such article or such substance shall consist, or by attaching thereto a label containing such marks."

(b) See *Mitford on Pl.* pp. 41, 42 (4th edit.)

(c) 1 *Ell. & B.* 439.

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Mr. Baggallay and **Mr. Fooks** in support of the bill. It is not necessary to allege that every article sold prior to the institution of the suit was marked "Rd." The bill sufficiently alleges, that the Plaintiffs are joint proprietors of the design, and that it was "duly registered," &c. "in accordance with the provisions of the act." This makes their title complete, and it is unnecessary to negative subsequent acts, which might destroy the existing right. It is not a condition precedent, but it is matter of defence to state subsequent acts by which the Plaintiffs' rights became forfeited. The production of the certificate (s. 16) will prove "that the provisions of the act and of any rule under which the certificate appears to be made, having been complied with." This certificate will of itself make out a *prima facie* title in the Plaintiffs at the hearing. According to the form of information given in the 8th section, it is sufficient to allege that the Informant "was the proprietor" of the design, and such is the form of declaration at common law. They referred also to the form of pleading in the case of patents; *Harrison v. Taylor* (a).

Mr. Selwyn in reply.

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Jun. 14.

The MASTER of the ROLLS.

The question on this demurrer is, whether the bill is defective, for not alleging that the Plaintiffs have complied with all the provisions of the 5 & 6 Vict. c. 100, or for not alleging, in express terms, that they affixed the letters "Rd," in some convenient place, on every article of the manufacture in question which has been published by them.

The

(a) 4 *Hurl. & N.* 815.

The principle upon which a demurrer lies to a bill may, for the purpose of the question before me, be broadly stated thus:—If the Plaintiff proves all the facts alleged in his bill, will he, in the absence of any other evidence, be entitled to any decree at the hearing? If this question must be answered in the affirmative, the demurrer must be overruled.

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Here the Plaintiff alleges, that he has “duly registered” his design. At the hearing he must prove this, and the proof of it is by the production of the certificate of the Registrar. This is provided for by the 16th clause of the act, which says, that the certificate “shall, in the absence of evidence to the contrary, be sufficient proof, as follows:—

Of the design, and of the name of the proprietor, therein mentioned, having been duly registered; and  
 Of the commencement of the period of registry; and  
 Of the person named therein as proprietor being the proprietor; and  
 Of the originality of the design; and  
 Of the provisions of this act, and of any rule under which the certificate appears to be made, having been complied with.”

At the hearing of this cause, therefore, assuming the Defendant to admit nothing, and to require the Plaintiff to prove everything, the Plaintiff will, by the production of this certificate, establish the five propositions enumerated and included in this section, and will throw on the Defendant the burthen of disproving them, or such one or more of them as he shall contest.

It follows, therefore, from this, that upon the Plaintiff proving what he has alleged by his bill, he will at the hearing

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hearing be entitled to a decree, upon the principle I have enunciated. This demurrer must, therefore, be overruled.

I am confirmed in this view of the case, by the circumstance, that the form of information which is given by the act (*a*) contains merely an allegation, that the informant is "the proprietor of a new and original design," and nothing more; this proprietorship can only be proved by the production of the certificate, which will establish the fact of the registration, and also the compliance, by the informant, with the other provisions of the act.

The analogy also to the case of patents assists this view of the case; in which, I am not aware that this Court has ever required the Plaintiff to allege in the bill or to prove at the hearing, unless put in issue by the Defendant, that he, the Plaintiff, has duly paid the two instalments of stamp duties (*b*) necessary for the purpose of keeping his patent alive. If the Defendant, in the case of a patent, insist that the patent is lost by reason of this neglect, or if, in the case before me, the Defendant insist that the Plaintiff has lost the monopoly given to him by the statute by reason of his non-compliance with the provisions of it, as to matters to be performed subsequently to registration, he must raise that question either by answer or by plea; in which case, the Plaintiff will simply produce his certificate of registration, and the burthen of proving that the Plaintiff has not complied with such provision of the statute will fall on the Defendant, liable, however, to be rebutted by the Plaintiff.

As it is, I must overrule the demurrer.

(*a*) Sect. 8.

(*b*) 16 & 17 Vict. c. 5, ss. 2, 3.

1863.

## SARAZIN v. HAMEL. (No. 2.)

Jan. 15.

THE Plaintiffs, who as before stated (a), registered a design for lace under the Copyright of Design Aet, 1842, (5 & 6 Vict. c. 100,) instituted this suit against the Defendant for an injunction and for relief against an infringement of their copyright in the registered design.

Upon a motion for an injunction, it appeared that the Plaintiffs had sold a quantity of lace of the same pattern in *France*, without attaching thereto the letters "Rd" and the distinctive number, as required by the 4th section of the act; and the question was, whether, by these acts done abroad, the Plaintiffs had forfeited their exclusive right to the pattern under the act.

Mr. *Baggallay* and Mr. *Fooks*, in support of the motion for the injunction, argued that acts done abroad by foreigners did not invalidate the rights given by the act; that it did not apply and was not intended to apply to persons and acts out of the jurisdiction of the English courts.

Mr. *Selwyn* and Mr. *Freeling* contra were not heard.

*The MASTER of the ROLLS.*

I will not trouble you. I am of opinion that by the evidence and by the very proper admission of the Plaintiffs, it appears that they have sold and have been

(a) *ante*, p. 145.

The copyright of a registered design is lost, if the proprietor (English or foreign) sell the registered article abroad without the letters "Rd" being attached thereto, as required by the 5 & 6 Vict. c. 100, s. 4.

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been in the habit of selling large quantities of this lace abroad, without anything to indicate that it had been registered in this country, and without marking it with the letters "Rd."

The question is, whether the previous monopoly given by this statute is lost by the non-compliance with the conditions imposed by the 4th section. It would be singular if the act did not apply to every sale and wherever it might be made.

The Plaintiffs are manufacturers at *Calais*, and it is contended that if they sell the lace there, to an Englishman, it need not be marked registered, but if the sale be made at *Dover*, it must be so marked.

The only difference is, that one man purchases on the other side of the Channel and another on this; while the object of this section of the act was, that the public should be warned against infringing a registered design and prevented from getting into litigation, by inadvertently imitating designs which have been registered and are entitled to protection.

Whatever the person having the monopoly of the design sells, he must give notice on the piece that it has been registered. It is true that the mark may be taken off by the purchaser, but that does not affect the vendor, as there is no privity between them.

The question is, is this proviso or condition limited to this country or does it apply everywhere? I read the two acts together.

By the 3rd section of the first act (5 & 6 Vict. c. 100,) the proprietor of a design not previously published,  
"either

"either within the United Kingdom of *Great Britain* and *Ireland* or elsewhere," is to have the sole right of applying it, it being registered according to the act, "provided the same be done within the United Kingdom of *Great Britain* and *Ireland*." But the subsequent statute of 24 & 25 Vict. c. 73, omits the latter words, and says "that the previous acts, and all acts extending or amending the same shall be construed as if the words 'provided the same be done within the United Kingdom of *Great Britain* and *Ireland*,' had not been contained in the said recited act ; and the said recited act and all acts extending or amending the same shall apply to every such design as therein referred to, whether the application thereof be done within the United Kingdom or elsewhere, and whether the maker or proprietor of such design be or be not a subject of her Majesty."

The act applies to everybody, to a design anywhere made, to foreign and English subjects. It is not compulsory, but any person, if he wants the benefit of this act, may register any design anywhere made ; but what is he to do ? He must register it, and then the 4th section says that no person shall be entitled to the benefit of the act, unless (amongst other things), every such articles published by him shall have thereon the letters "Rd" and the particular distinctive number.

What does that mean ? The act applies to everybody who invents a design, and everyone, Englishman or foreigner, is to have the benefit of this act, but he is to lose it, unless after the publication every article is marked "Rd."

Has every article published by the Plaintiffs had the letters "Rd?" No; the Plaintiffs say, we are foreigners and this part of the act does not apply to articles published

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lished abroad. Why not, what is there to say that it means published within *England or Ireland*, what power has the Court to introduce into the act these words, which relate to all foreigners as well as to all Englishmen?

I am of opinion that the condition, the performance of which is necessary, is just as general as the benefit given by the act, and that if a foreigner choose to take the benefit of this statute, he must comply with its conditions and put on the registered article the letters "Rd," and if he do not, he loses the benefit of the act.

It is not of the slightest importance whether the sale is at *Calais* or at *Dover*; the spirit, the meaning and the words of the act are clear, and they apply to every person and to every place. The Plaintiffs not having complied with the terms of the statute I must refuse this motion with costs.

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NOTE.—By consent, the bill was dismissed with costs.

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1863.

## SANDERSON v. STODDART.

Jan. 16.

**O**N the application of a creditor, the usual administration order had been made against the executor.

It appeared from the certificate, that the executor had received 2,871*l.* and had paid 2,613*l.*, part of which was for judgments voluntarily confessed by him, leaving a balance due from him of 257*l.* This sum constituted the whole assets.

The debts remaining unpaid amounted to 1,490*l.*

**Mr. Ince**, for the Plaintiff, asked that, as the estate was deficient, the costs of all parties might be paid *pro rata*, and the residue, if any, divided amongst the creditors.

**Mr. Selwyn**, for the executor, claimed to have his costs in priority of all other claims; *Gaunt v. Taylor* (*a*).

**Mr. Ince**, in reply, insisted that the executor had disentitled himself to priority by voluntarily confessing judgments which had swept away the assets.

*The Master of the Rolls.*

I think the executor must have his costs allowed in priority.

(*a*) 2 *Hare*, 413.

An executor voluntarily confessed judgments, which he paid, and afterwards, in an administration suit, the assets were insufficient to pay the remaining debts. Held, that the executor was still entitled to priority for his costs of suit.

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*Jan. 16, 17.*

A decree for foreclosure was made against a *cestui que trust*, and the bill was taken *pro confesso* against his trustees. The decree was served on the trustee, but without the necessary notice. After the expiration of three years, the Court dispensed with service of the decree on the trustee altogether, and made it absolute against him.

## THURGOOD v. CANE.

THE 22nd Consolidated Order, art. 2, r. 11, requires, that "unless the Court shall dispense with service thereof," an office copy of a decree taken *pro confesso* shall be served on the Defendant, *with notice* of the time within which he may apply to set aside the decree.

By the 22nd Consolidated Order, art. 15, r. 3, a decree *pro confesso* may be made absolute "after the expiration of three years from the date of the decree, when a Defendant has not been served with a copy thereof."

Mr. L. Field now applied to the Court to dispense with service of the decree on a trustee altogether. He stated that on the 3rd of December, 1859, a decree for foreclosure had been made against one of the *cestuis que trust*, who was interested in the mortgaged estate under the will of the mortgagor, and that it had been taken *pro confesso* against his bare trustee, who was resident abroad. That the decree had been served, but without any notice as required by the 22nd Consolidated Order, art. 2, r. 11.

He submitted that, under the circumstances, the Court might dispense with the service altogether, and make the decree absolute, although the service had been informal. That in all cases, under the General Orders, the Court had a dispensing power; *Ferrand v. The Corporation of Bradford* (a); but that here the order expressly

(a) 21 Beav. 422; 8 De G., M. & G. 93.

expressly gave such a power. That the Court had acted similarly in *Benbow v. Davies* (*a*), under the same Order, and that the proper course seemed to be, to wait until the expiration of the three years before applying for the order to dispense with service; *James v. Rice* (*b*).

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I will consider whether I can do it. My difficulty is, that the trustee knows that the service on him was informal, and may not have come forward to set aside the decree, because he knows that, as matters stand, you cannot obtain the order absolute.

The Master of the Rolls dispensed with service of the decree on the trustee and made the order absolute.

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(*a*) 12 *Beav.* 421.

(*b*) 5 *De G., M. & G.* 46.

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Devise to *A.* for life, and after her decease to her "lawful issue" then living and the "children" of such of them as should be then dead, in equal shares, the children of such issue to take their "parent's share." Held, that the word "issue" was to be construed "children," and that the children of *A.* and the children of *A.*'s children who pre-deceased her took for life only.

FAIRFIELD v. BUSHELL.

THE testator, *John Carter*, by his will dated in 1815, devised as follows:—

"I give and devise unto my daughter *Mary Bushell*, all my messuages or dwelling-houses, lands and premises, with the appurtenances thereto belonging, situate in *Liscard*, in the county of *Chester*, to hold to her and her assigns during the term of her natural life, without being subject to the debts or control of her present or after taken husband. And after her decease, I give and devise the same unto the *lawful issue* of my said daughter then living, and the child or *children* of such of them as should be then dead, whether male or female, in equal shares and proportions, the child or children of such deceased issue to take his, her or their deceased *parent's* share only, and each and every of them to hold the same as tenants in common and not as joint tenants. And I strictly order and enjoin, that the said last-mentioned premises or any part thereof shall not, on any account, be sold, mortgaged or in anywise encumbered."

The testator also gave, devised and bequeathed all the rest and residue of his estate and effects, of what nature or kind soever and wheresoever, not thereinbefore given and disposed of, unto his son *John*, his heirs, executors, administrators and assigns for ever.

The testator died in 1821, and his daughter *Mary Bushell*, who survived him, died in 1854, leaving two children then living, viz., *John* and *Sarah*, and two children

children of a deceased son *Samuel*, viz., *Mary Ann* and *John* the younger.

This bill prayed a partition, and a question arose as to the true construction of this devise.

Mr. Selwyn and *Mr. North* for the Plaintiffs *Sarah* and others, who were entitled to the interest, if any, of *John*, the residuary devisee and heir-at-law. The words "lawful issue" must, in this case, be construed "children" and be limited to issue of the first generation, in consequence of the subsequent direction that the "children" shall take their "parent's share;" *Sibley v. Perry* (a); *Pope v. Pope* (b); *Jarman on Wills* (c).

Secondly. There being no words of inheritance attached to the gift to the children or to that to the grandchildren (who take by substitution only) they are entitled for life only, and the remainder in fee passes, under the devise, to *John* the heir-at-law, and is now vested in the Plaintiffs under his will; *Sturgis v. Dunn* (d).

Mr. Kay for *John Bushell* the elder. The daughter *Mary Bushell* took an estate tail; for it is a devise to one for life, with remainder to her lawful issue, which plainly gives an estate tail. That which is engrafted on it makes no difference, as the direction is, that the issue shall take as tenants in common, that was the case in *Jesson v. Wright* (e); *Roddy v. Fitzgerald* (f). The testator intended that the estate should remain in the family of the devisees for all generations and should never be sold.

Mr.

(a) 7 *Ves.* 522.

(b) 14 *Beav.* 591.

(c) Vol. 2, p. 83 (2nd edit.)

(d) 19 *Beav.* 135.

(e) 2 *Bligh (O. S.)* 1.

(f) 6 *H. of L. Cas.* 823.

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Mr. Cole and Mr. F. Webb for John the younger. *Sibley v. Perry* and that class of cases, where the word "issue" is limited for the purpose of giving effect to a gift and of preventing its being too remote, have no application. The issue living at the decease of *Mary Bushell* take an estate tail, and those who take the substituted gift to the children of deceased issue take the same estate. A devise to the heirs of *A.* would pass the fee, so one to the issue of the body of *A.* would give an estate tail, and therefore a devise to the issue simply would give the same interest or an estate tail. They cited *Whitelock v. Heddon* (a); *Harrison v. Harrison* (b).

*The Master of the Rolls.*

I regret to say I must decide this case in favor of the Plaintiffs.

There can be no doubt but that the rules of law which give a strict construction to technical words very often violate the intentions of testators, but I cannot disregard those rules, without overruling a series of decided cases, which I have no power to do. The principles and rules of construction must therefore be followed in this case.

Here the devise is to the daughter for life, and after her decease unto her lawful issue then living. If it had stopped there, I should have adopted *Whitelock v. Heddon* (a) and have taken the word "issue" in its most comprehensive form, and have held that it meant all the issue of the daughter, of every sort and however remote, as children, grandchildren and great grandchildren and so on. But I think it improper so to treat it, for, first, there are the words "then living," which create some difficulty,

(a) 1 *Bos. & Pul.* 243.(b) 7 *Man. & Gr.* 938.

difficulty, and then we have the words "and the child and children of such of them as should be then dead," in "equal shares," the *children* taking their deceased parent's share. It is clear, that where a testator speaks of the "children" of "issue" taking their parent's share, you must cut down the meaning of the word "issue" to "children." For as the word "issue" unrestricted includes all the descendants, when you speak of the *children* of the issue those words have no meaning unless you restrict the word "issue." I must, therefore, hold that the word "issue," in this will, means "children," and that "the children of such deceased issue take" their parent's share only.

If I could find any words to enlarge the devise, or anything amounting to a gift of an estate of inheritance, or if there had been any gift over, I should be bound to follow *Jesson v. Wright*. But I think that the Court is concluded by these technical words, and therefore, that the *children* of *Mary Bushell* living at her death, and the *children* of her son *Samuel* who died in her lifetime, take respectively for their lives only, and that on their deaths the shares will fall into the residue.

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FORD v. TENNANT. (No. 2.)

June 27, 28.

Professional privilege is limited to communications of a solicitor with his client and with those persons necessarily employed under the solicitor; it does not extend to communications between a solicitor and third parties.

In a dispute between A. and B. the solicitor of A. had communications with B. Held, that they were not privileged.

BY this bill, the Plaintiff (the executor of the late Lord *Kensington*) sought to have the benefit of a purchase made by Mr. *Tennant* (his, Defendant's, late solicitor) of an annuity of 1,050*l.* granted by Lord *Kensington* to a Mr. *Savage* (a).

Mr. *George Booth*, a solicitor, was subpoenaed on behalf of the Plaintiff to give evidence in the case. He attended and counsel proceeded to examine him as to certain letters which he had received from and communications he had formerly had with Messrs. *Harrison & Finch* (the solicitors of the Defendants in this suit), at a time when he (the witness) was acting as the solicitor of Captain *Rooke*, in asserting a claim to the annuity in question in this suit.

The witness declined to produce the letters or to give the dates of them or answer the question put to him, stating that he conceived that all letters received by him respecting the business of his client were privileged communications, and that he was directed by Captain *Rooke* not to give any information he was in possession of as his solicitor respecting Captain *Rooke's* matter.

The questions put to the witness and his answers thereto, as taken down by the examiner, were as follows :—

“ In the month of *November*, 1857, as I believe, Mr. *Rooke*,

(a) See 29 *Beav.* 452.

CASES IN CHANCERY.

Rooke of *Ilford* manor employed me as his solicitor respecting a matter relating to Lord *Kensington's* estate. That matter was in respect of the annuity granted to Mr. *Savage*. I communicated with Mr. *Finch*, of the firm of *Harrison & Tennant*, on the subject, and I also saw Mr. *Charles Tennant* on the matter, I had also communications in writing with Mr. *Finch*. I had some papers with me relating to the matter. The date of the first letter I received from Messrs. *Harrison & Finch* was in *January*, 1858. I decline to produce that letter, on the ground that I consider all letters received by me respecting the business of my client are privileged communications, and that I ought not to produce that letter. I am employed by Mr. *Rooke* and his brothers, and I hold that letter and other papers as the solicitor and professional adviser of Mr. *Rooke* and his brothers.

"Question. I ask the date of all the other letters you have ?

"Answer. I decline to give the dates of all the letters received by me in the matter in which I was employed as the solicitor of Mr. *Rooke* and his brothers, on the ground above stated.

"Question. Did you make a claim on behalf of your clients on Messrs. *Harrison & Finch*?

"Answer. I decline to answer the question.

"Question. Did Messrs. *Harrison & Finch* make any representations to you on the subject of *Savage's* annuity?

"Answer. I had several conversations with them and they with me on the subject, chiefly with Mr. *Finch*, but I had some with *Charles Tennant*. Messrs. *Harrison & Finch* was then the firm.

"Question. What did Mr. *Finch* say ?

"Answer. I decline to state.

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"Question. What did Mr. Tennant say ?

"Answer. I decline to state. I was directed by Mr. *Rooke* not to give any information I was in possession of as his solicitor respecting Mr. *Rooke's* matter. I cannot say when I last saw Mr. *Finch*, it was perhaps in 1858 or 1859 that I last saw him about Mr. *Rooke's* matters. I have not had any conversation with him respecting the matter of this suit. I prepared a case for the opinion of counsel and I obtained my information to enable me to prepare that case from my clients, some from Mr. *Rooke* and some from his brother ; I cannot remember whether I obtained my information from any other person. I do not remember whether I obtained my information from Mr. *Tennant*, and I decline to look at any papers I may have, to search when I received any information from *Harrison & Finch*. I obtained some copies of documents from some one, but I do not remember from whom I received them. I do not remember whether I received any documents from Mr. *Tennant*. I do not know what is meant by documents, but I believe I received some papers, I believe from Mr. *Finch*; to the best of my remembrance I received a copy of some deed from him, but no agreement or copies of agreements that I remember. I ceased to act as solicitor for Mr. *Rooke* in that matter either in 1858 or 1859. I believe that my bill has been paid.

"Question. By whom was it paid ?

"Answer. I decline to answer the question. I did not act as solicitor for Mr. *Rooke* in the matter of an assignment of *Savage's* annuity.

"Question. Did you act as Mr. *Rooke's* solicitor on the occasion of his abandonment of his claim to *Savage's* annuity ?

"Answer. I object to answer the question."

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The usual order of course had been made to set down the witness's objections to be argued, and they were now brought on for argument.

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Mr. *Lloyd* in support of the objections. The rules as to the privilege of a solicitor, which is really that of the client, have of late been somewhat relaxed. The privilege is no longer restricted to those which take place after a litigation has been commenced; *Herring v. Clobery* (a); *Desborough v. Rawlins* (b). The rule is not restricted to communications between the solicitor and client, but extends to information acquired by him solely in the character of solicitor. Lord *Brougham* held, that as to communications received by solicitors "in their professional capacity, either from a client or on his account and for his benefit," * * * "they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information;" *Greenough v. Gaskell* (c). Lord *Lyndhurst* held that a solicitor was not bound to disclose information which he "acquired in his character of solicitor of the mortgagees" (his clients); *Jones v. Pugh* (d).

If communications between the two opposing solicitors and their clients are respectively protected, the communications between the two solicitors themselves are equally protected as against third parties, for the information, on each side, is derived by the solicitor from his client.

~~Mr. Southgate and Mr. Hemming contrà.~~ The privilege of a solicitor is limited to what takes place between him and his client, and does not extend to communications

(a) 1 *Phil.* 91.(b) 3 *Myl. & Cr.* 515.(c) 1 *Myl. & K.* p. 102.(d) 1 *Phil.* 99.

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communications between the solicitor and adverse parties or strangers; the reason for the rule does not apply in such cases. It is impossible that anything which Messrs. *Harrison & Finch* said or wrote to Mr. *Booth*, the solicitor of Captain *Rooke*, can be privileged, for there was no professional confidence between them. The case of *Greenough v. Gaskell* (*a*) arose on the answer, and the passage relied on in the judgment was a mere *obiter dictum*. In *Jones v. Pugh* (*b*) the question did not relate to communications, but to mortgage or title deeds. In suits for the specific performance of contracts entered into by correspondence between solicitors, the correspondence is constantly ordered to be produced; *Taylor on Evidence* (*c*); *Steele v. Stewart* (*d*); *Tippins v. Coates* (*e*); *Griffith v. Davies* (*f*); *Spenceley v. Schulenburgh* (*g*); *Sawyer v. Birchmore* (*h*); *Gore v. Bowser* (*i*); *Desborough v. Rawlins* (*k*).

*Mr. Lloyd* in reply. The statement of Lord *Brougham* in *Greenough v. Gaskell* was not an *obiter dictum*. The question raised related to papers and letters written or received by a solicitor "in his capacity of confidential solicitor for *Darwell*, for whom he had been professionally concerned for a number of years," and were not limited to those between the solicitor and his client. The evils arising from the revelation of secrets derived from professional employment are (in the language of Lord Justice *Knight Bruce*) "too great a price to pay for truth itself;" *Pearse v. Pearse* (*l*).

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| ( <i>a</i> ) 1 <i>Myl. &amp; K.</i> 98.    | ( <i>g</i> ) 7 <i>East</i> , 357.          |
| ( <i>b</i> ) 1 <i>Phil.</i> 96.            | ( <i>h</i> ) 3 <i>Myl. &amp; K.</i> 572.   |
| ( <i>c</i> ) Vol. 1, pp. 730, 744, 751.    | ( <i>i</i> ) 5 <i>De Gex &amp; S.</i> 30.  |
| ( <i>d</i> ) 1 <i>Phil.</i> 471.           | ( <i>k</i> ) 3 <i>Myl. &amp; Cr.</i> 515.  |
| ( <i>e</i> ) 6 <i>Hare</i> , 16.           | ( <i>l</i> ) 1 <i>De Gex &amp; Sm.</i> 28. |
| ( <i>f</i> ) 5 <i>Barn. &amp; Ad.</i> 502. |                                            |

*The Master of the Rolls.*

This is the demurrer by a witness, who objects to answer certain questions, on the ground that the information was acquired by him solely in the character of solicitor of his client; and on that ground and on that ground alone, he insists that he is not bound to answer the questions. That he was the solicitor of Captain *Rooke*, and that during the time in question he was actually engaged as his solicitor, is not disputed. The question is, whether these communications are privileged or not? They were not derived from the client, but from a person who was a stranger to him, and I concur that the decision depends on whether he can avoid the discovery, in consequence of having been then the solicitor of Captain *Rooke*, and that nothing which had previously occurred between Mr. *Tennant* and Captain *Rooke* can affect the question.

The reason for the rule which establishes the privilege is obvious, and it is acknowledged in all the cases. It is for the interests of justice that the most full, free and complete communication should take place between a client and his solicitor, for if that did not take place, it would be impossible to conduct a suit or to obtain justice, or for a man to defend himself and prevent an injustice. It is, however, important that this rule should not be extended further than is necessary for the purposes of justice, and it struck me, during the argument, that the rule could not extend to a case, where the information was obtained by a solicitor acting as such, but was not derived from the client himself. In the course of the argument, I suggested a case, where it was admitted that the privilege must be qualified to this extent:—that the communication must be one in which the client had an interest, and that otherwise the solicitor could not protect himself from answering.

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My opinion is, that the authorities restrict the rule to communications between a solicitor and his client, extending it to all other persons with whom the solicitor must communicate in order to conduct the cause; such as communications between the client or the solicitor with persons employed to get up evidence, as in the case of *Steele v. Stewart* (*a*). But there is a very broad and marked distinction between information derived in those cases and information derived from third parties, from strangers, or from the opponents of the client.

I should not have had much doubt on this point had it not been for the *dictum* in *Greenough v. Gaskell* (*b*), and I was desirous to read and consider it before I decided this case. The passage is this:—"If, touching matters that come within the ordinary scope of professional employment, they (solicitors) receive communication in their professional capacity, either from a client or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they knew only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as a witness."

Now it must be admitted that this extends beyond the communications between a client and his solicitor, it is expressly stated, that if solicitors "receive communications in their professional capacity, either from a client or on his account and for his benefit," they are bound to

(*a*) 1 *Phil.* 471.

(*b*) 1 *Myl. & K.* 102.

to withhold such matters. Such communications might be from any person whatever; and I certainly must admit that Mr. *Lloyd* was just in stating that this was not an *obiter dictum*, for the Court did not compel the solicitor to produce papers, some of which were received from his client and some apparently from other persons. If the communications with strangers were liable to production, the solicitor would have been ordered to shew which of them had been communicated to him from his client and which from strangers; so that those derived from the client might be protected and the others ordered to be produced; and Lord *Cottenham*, in *Desborough v. Rawlins* (a), suggested that that would be the proper course. The case of *Greenough v. Gaskell* has been repeatedly followed and repeatedly approved of, but not on this particular point, and I thought it necessary to consider whether this question had been pointedly brought to the attention of Lord *Brougham*. Unfortunately it does not appear, for although Lord *Brougham* states many cases, it does not appear that any case, on this particular point, was cited in the argument. For instance, the case of *Spenceley v. Schulenburgh* (b) is not mentioned. I am therefore bound to look how that case has been followed, and I cannot find, nor has my attention been called to a single case, in which that particular part of the judgment has been followed, and I do not believe that such a case can be found to exist. I think that Lord *Brougham* can hardly be considered to have overruled the cases previously decided, which had confined privilege to communications between solicitors and their clients or the agent of clients.

In *Spenceley v. Schulenburgh* (b) it was proposed by the Plaintiff to call the Defendants' attorney to prove a notice

(a) 3 *Myl. & Cr.* 515.

(b) 7 *East*, 357.

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notice to produce an agreement which had been served on him by the Plaintiff's attorney, and Lord *Ellenborough* held, that the Defendants' attorney was not bound to disclose the contents of the paper, which he had become acquainted with in his confidential character of attorney. But when the case came into Bank, he admitted that he was wrong, and stated "he had had great doubts at the time he rejected the witness, and was afterwards satisfied that he had acted hastily. That the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him, as attorney in this cause, from the opposite party, in the disclosure of which there could be no breach of confidence."

Lord *Cottenham* in *Desborough v. Rawlins* (a) did not profess to doubt the passage in Lord *Brougham's* judgment, but it is impossible that the passage in *Desborough v. Rawlins* can be maintained, consistently with the passage in *Greenough v. Gaskell*. Lord *Cottenham* says "both *Bramwell v. Lucas* and *Greenough v. Gaskell* shew, that the privilege only applies to cases in which the client makes a communication to his solicitor, with a view to obtaining his legal advice. That is undoubtedly the same ground upon which I held, in *Sawyer v. Birchmore*, that a solicitor, when examined as a witness, was bound to produce letters communicated to him from collateral quarters, and to answer questions seeking information as to matter of fact, as distinguished from confidential communications: and I so decided, not on the authority of *Bramwell v. Lucas* only, but I distinctly referred to *Spenceley v. Schulenburg*. In *Sawyer v. Birchmore* (b) the

(a) 3 *Myl. & Cr.* 515.(b) 3 *Myl. & Cr.* 522.

the question arose as to a solicitor being bound to disclose the circumstances of certain transactions in which he had been concerned as solicitor. I was of opinion that the facts were not sufficiently brought before me to shew that they were privileged, and finding it laid down by the Court of Queen's Bench, that communications are not privileged if coming from any other quarter, but that they would be if they came from the client, I found that a case might exist in which many papers in a solicitor's hands would not be privileged. It was precisely the same in *Spenceley v. Schulenburgh*. I thought, therefore, that the facts did not bring the case within the privilege applicable to confidential communications."

Here then is an express and direct decision, after considering the case of *Greenough v. Gaskell*, that the communication must come from the client directly or indirectly, and that the principle of privilege does not apply to communications which come from any other quarter. The same thing is expressly decided not only in *Spenceley v. Schulenburgh* but also by a very careful Judge, Sir James Parker, in *Gore v. Bowser*(a). In that case, the Defendant sought to examine the Plaintiff's solicitor, Mr. Goode, as to what passed at an interview between the solicitor and the Defendant, and the witness demurred. Sir James Parker says, "I cannot doubt that Mr. Goode is bound to answer this interrogatory. In the course of a transaction in question in the cause, the Plaintiff employs his solicitor as his agent to communicate with the opposite party. I do not see how this can be regarded as a confidential or privileged communication, and I consider that the Defendant must be at liberty to give the communication in evidence,

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(a) 5 De G. & Sm. 33.

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evidence, and to examine the solicitor as a witness to prove what it really was. Suppose the communication had been by letter, it is every day's practice to order parties to produce letters or copies of letters passing between their solicitors and the opposite parties or their solicitors."

The judgment puts it very clearly, and it is precisely this case. In this case, it appears that the solicitor acted for his client in the character of an opponent.

I have this option:—either to follow *Greenough v. Gaskell* or the two other cases, in which a different doctrine is laid down and appears to have been acted on. I am of opinion that this point was not brought to Lord *Brougham's* attention, which was directed to communications between solicitor and client, and it is clear that Lord *Cottenham* entertained that view of the case, he having been the successful counsel in *Greenough v. Gaskell*.

I am of opinion that the demurrer must be overruled and that the usual order must be made.

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NOTE.—See *Walsham v. Stainton*, V. C. Wood, 10 Dec. 1863.

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*Re PUGH.*

Jan. 30, 31.

**I**N December, 1861, the Petitioner Mr. *Briscoe* employed Mr. *Pugh* as his solicitor in matters relating to his father's settlement, and as to an advance of 500*l.* required by him upon the security of his reversionary interest therein.

Mr. *Pugh* himself agreed to make this advance of 500*l.* on account, of which he paid the Petitioner 150*l.* on the 4th of *January*, 1862, and 250*l.* on the 8th of *January*, 1862. On the 20th of *January* Mr. *Pugh* delivered his bill of costs, amounting to 89*l.* 9*s.* 2*d.*, and he paid over the balance to Mr. *Briscoe*, who gave a receipt for the amount, and a mortgage of his reversionary interest to secure the 500*l.*

After this, Mr. *Briscoe* continued to employ Mr. *Pugh* until the 27th of *March*, 1862, when he changed his solicitor.

The mortgaged property was afterwards sold, and the 27th of *June*, 1862, was appointed for completing the purchase at *Worcester*. The parties, some of whom came from a distance, met, and on that day Mr. *Pugh*, for the first time, delivered his second bill of costs for business done subsequent to the 20th of *January*, amounting to 113*l.* 14*s.* 5*d.* He insisted on having it paid before he completed the purchase, and the client was thus compelled, but under protest, to allow him to retain that sum out of the purchase-money.

This petition was presented on the 16th of *December*, 1862, praying the taxation of the two bills. It specified items of over-charge.

A client paid his solicitor's bill in *January*; he changed his solicitor two months and a-half afterwards, and in *November* following he presented a petition for the taxation of the bill, on the allegation of simple over-charges. The application was refused.

On a meeting in *June* to settle a purchase, the solicitor for the first time delivered his bill, and he insisted on payment before completion. It was paid under protest, and in *November* following a petition was presented for taxation, alleging items of over-charge. The Master of the Rolls ordered a taxation, and his decision was affirmed by the Lords Justices.

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Mr. *T. A. Roberts*, in support of the petition, argued, first, that Mr. *Pugh*, as mortgagee, had no right to charge the Petitioner for his trouble in matters relating to his mortgage; *Langstaff v. Fenwick* (*a*); *French v. Baron* (*b*); *Godfrey v. Watson* (*c*).

Secondly, that the bills had been paid under pressure, the first while the relation of solicitor and client subsisted, and when it was, therefore, the duty of the solicitor to state to his client that the first bill contained over-charges; and the second, under irresistible pressure, as the purchase could not be delayed until a taxation of the bill could be procured.

He referred to *In re Rance* (*d*); *In re Steele* (*e*); *Horlock v. Smith* (*f*); *Ex parte Wilkinson* (*g*).

Mr. *Southgate* and Mr. *Elderton*, *contra*, insisted, that, to entitle a client to a taxation after payment, there must be pressure and common overcharges, or overcharges so gross as to amount to fraud; and that there must be no delay in making the application. That all these requisites were wanting in this instance. They relied on the acquiescence of the Petitioner after the relation of solicitor and client had ceased, and on the long unexplained delay in making the application.

They cited *Re Fyson* (*h*); *Re Browne* (*i*); *Re Hubbard* (*k*); *Re Barrow* (*l*); *Barwell v. Brooks* (*m*); *Re Finch* (*n*).

Mr. *Roberts* in reply.

*The*

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|---------------------------------------------------------------|-----------------------------------------------------------------------------------|
| ( <i>a</i> ) 10 <i>Ves.</i> 405.                              | ( <i>h</i> ) 9 <i>Beav.</i> 117.                                                  |
| ( <i>b</i> ) 2 <i>Atk.</i> 120.                               | ( <i>i</i> ) 15 <i>Beav.</i> 61; 1 <i>De G.,</i>                                  |
| ( <i>c</i> ) 3 <i>Atk.</i> 517.                               | <i>M. &amp; G.</i> 322.                                                           |
| ( <i>d</i> ) 22 <i>Beav.</i> 177.                             | ( <i>k</i> ) 15 <i>Beav.</i> 251.                                                 |
| ( <i>e</i> ) 20 <i>L. J. (Ch.)</i> 563.                       | ( <i>l</i> ) 17 <i>Beav.</i> 547.                                                 |
| ( <i>f</i> ) 2 <i>Myl. &amp; Cr.</i> 495.<br><i>Coll.</i> 92. | ( <i>m</i> ) 8 <i>Beav.</i> 121.<br>( <i>n</i> ) 4 <i>De G., M. &amp; G.</i> 108. |

*The Master of the Rolls.*

I am of opinion, that the Petitioner is not entitled to a taxation of the first bill.

I have always held, that when a client is practically obliged to pay a bill of costs without having an opportunity of inspecting and examining it, it amounts to pressure.

I have also held, that mere retention of the amount of a bill of costs is not to be regarded in same light as a voluntary payment of it by the client.

But the circumstances are different as to the two bills. It appears that the solicitor was employed to raise a sum of 500*l.* He agreed to advance it himself, and paid 150*l.* on the 4th of *January*, and 250*l.* on the 8th of *January*. There, therefore, only remained 100*l.* to be paid, and it is clear that the solicitor was to have his costs out of that sum. On the 20th of *January*, the client signs a receipt for the balance, and this was a simultaneous transaction with the delivery of the bill. If the client had come immediately afterwards and said, I trusted to the delivery of a proper bill, but I find that it contains improper items, I should probably have thought that, on proof of overcharges, he would have been entitled to tax that bill. But he made no claim to tax this bill until *November* following. Mr. *Roberts*, however, argues that, the fact that Mr. *Pugh* continued the Petitioner's solicitor is a sufficient excuse; but I am not of that opinion. The reason why the Court does not allow a taxation after payment, and where there has been delay in making the application, is this:—A solicitor loses vouchers, and no objection being made to his bill, he does not think it necessary to preserve them, and

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and he cannot, therefore, after a long delay prove the facts material for the allowance of many items. But the fact of Mr. *Pugh's* continuing the Petitioner's solicitor for two-and-a-half months afterwards is rather unfavorable to his case. Nothing is more common than to pay a solicitor's bill every year. The Petitioner continued during two-and-a-half months the client of Mr. *Pugh*, he then changes his solicitor, and makes no complaint as to that bill for ten months. I do not think I ought, if that stood alone, to tax that which is the first bill.

It is justly observed, that the two bills are not connected together; the second bill stands in different situation. The Petitioner came by appointment to receive the surplus of the purchase-money, but he could not get it unless he paid the second bill. It was a matter of importance to him to receive the balance, and to postpone the settlement of the purchase would have put all persons to great inconvenience. I have always held, that this is evidence of pressure in a greater or less degree. The client could not then tell whether there were overcharges or not. He paid the bill in *June*, and complained of it in *November* following, and it was not possible, under the circumstances of this case, to obtain the common order to tax. This brings it within the cases where taxation after payment is ordered.

Tax the second bill, but not the first.

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#### *The Master of the Rolls.*

Jan. 31.

I think that this is not a proper case to give any costs.

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**Note.**—On an appeal by Mr. *Pugh* the Lords Justices, on the 2nd of *June*, 1863, affirmed the decision as to the taxation of the second bill.

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## BROMLEY v. WILLIAMS.

Feb. 11, 12.

THIS case came before the Court on general demurrer to the whole bill.

According to the statements of the bill, a mutual insurance society had, previously to 1858, been established at *St. Ives*, called "*The St. Ives Shipping Insurance Club*," the members, consisting of shipowners, mutually insured their ships against loss, and agreed to contribute to such loss in rateable proportion, to the extent of the amount insured by them respectively.

The club was regulated by certain rules and regulations binding on all the members, and which were set out in the bill, which so far as material were as follows :—

"13. Vessels entering shall pay as follows :—One-third part of the *per-cent*age of the amount of the stock in hand when entered, one-third at the end of two months, and the remainder at the end of four months from the date of entry ; but should losses or other circumstances require an earlier payment of the second

and

duly appropriated. A ship of a member having been lost at sea, he sued seven of the members and the treasurer and secretary to obtain payment of the loss. There being no finance committee : Held, on demurrer, that these Defendants had not improperly been made parties.

By a rule of a shipping insurance club, a fine was imposed on non-payment of the premium for a month after it became due, and at the end of two months, he was to be deprived of the benefit of insurance until the arrears were paid. A member insured his ship, which was lost at sea after the premium became due but before the expiration of the month. Whether, on subsequently paying the premium, the member was entitled to the sum insured, *quare*.

As to the modern practice of making several of a numerous class represent the class both as Plaintiffs and Defendants.

Some ship-owners joined in a club, and provided for the mutual insurance of their respective vessels.

Held, that this was not an illegal association under the 35 Geo. 3, c. 63 ; but whether it is necessary to have a policy in such cases, *quare*.

By the rules of a shipping insurance club, its affairs were to be managed by the members, assisted by the treasurer and secretary, and the "finance committee" were to sign all cheques and see that the funds were

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and third instalments, it shall be made accordingly, on the secretary giving notice thereof."

"14. When the stock of the club is reduced below 5*l.* per cent., there shall be a payment of 10*s.* per cent. per quarter on the amount insured on each vessel; and if the funds are at any time found insufficient to meet the claims, the treasurer shall be ordered to collect from each member such a per-cent-age as shall be deemed necessary."

"16. Any member neglecting to pay any premium, call or fine for the space of one calendar month after it becomes due and notice thereof given by the secretary, shall pay a fine of 10*l.* per cent. per month on the amount, and at the end of two calendar months from the date of the notice shall be deprived of all benefit of insurance until such arrears are paid."

In *July*, 1858, *John Dale*, the owner of a vessel called "*The Betsey*," became a member of the club in respect of that vessel, which he insured in the club for 250*l.*

Down to *October*, 1860, *John Dale* paid the secretary all his premiums, calls and fines, but, as the bill alleged, "through some mistake he omitted to pay the premium which became due in *October*, 1860," and on the 18th of that month *William Tonkin*, the secretary, sent him a notice that unless the premiums then due from him in respect of the said vessel, and which amounted to 3*l.* 15*s.*, were paid on or before the 13th day of *November* next, his claim upon the club would be forfeited.

On

On the 23rd of *October*, 1860, *The Betsy* was totally lost at sea.

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On the 25th of *October*, 1860, *John Dale* sent to *William Tonkin*, the secretary of the club, notice of the loss of the vessel by *John Rowe* the captain, and *William Tonkin* then told him that the premium due in respect of the vessel had not been paid, and desired him to go back to *John Dale* and tell him to remit to him, *William Tonkin*, the sum of 3*l.* 15*s.* In consequence thereof, *John Dale*, on the following 26th of *October*, remitted the sum of 3*l.* 15*s.* to *William Tonkin*, as the secretary of the club; but *William Tonkin* refused to receive, and in fact returned it, and subsequently *John Dale*, on three different occasions before the 13th of *November*, 1860, sent a cheque on the *Penzance Bank* for the sum of 3*l.* 15*s.* to *William Tonkin*, which *William Tonkin* each time refused to receive and returned. Finally *John Dale*, before the 13th day of *November*, 1860, tendered to Mr. *Williams*, the treasurer of the club, 3*l.* 15*s.* in cash; but Mr. *Williams*, on the part of the club, refused to receive the same, and such premium had therefore never been paid.

The Plaintiff, who was the assignee in bankruptcy of *John Dale*, filed this bill against *Williams* (the treasurer), *Tonkin* (the secretary) and seven of the members of the club, stating the above circumstances and alleging, in the usual way, that the other members were too numerous to be made parties, and that the Defendants sufficiently represented them.

The bill prayed, 1, A declaration that the Plaintiff was entitled to be paid the 250*l.* out of the moneys and property

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property of the *St. Ives Shipping Insurance Club*, or by the rateable contributions of the persons who were members thereof at the time of the loss of the vessel.

2. That the Defendants might be decreed to pay the amount due to the Plaintiff out of the funds of the club, or to cause the amount to be raised and paid by the persons who were members of the club at the time of the loss of the vessel, or such of them as were liable to contribute thereto, according to the rules and regulations of the club and the customary mode of payment and satisfaction of claims in use in the club.

The bill contained no allegation that any policy had been granted to *John Dale*.

To this bill, the seven members together, and the secretary and treasurer separately, demurred for want of equity.

Mr. Speed in support of the demurrer of the seven members. First, this bill shews no liability on the part of the Defendants, and it alleges a several and separate legal liability which cannot be the subject of such a suit as this; *Strong v. Harvey* (a). The finance committee, if there had been one, would have been the proper parties to sue. Secondly, the society is illegal and the contract is rendered invalid by statute. By the 35 Geo. 3, c. 63, s. 11, it is enacted, "That every contract or agreement which is made or entered into for any insurance, in respect whereof any duty is by this act made payable, shall be engrossed, printed or written, and shall be deemed and called a policy of insurance, and that the premium, or consideration in the nature of a premium, paid, given or contracted for upon such insurance, and the particular risk or adventure insured

(a) 3 Bing. (O. S.) 304.

insured against, together with the names of the subscribers and underwriters and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof, every such insurance shall be null and void to all intents and purposes whatever;" and by the 14th section no contract or agreement for insurance can be given in evidence unless properly stamped. See *Reid v. Allan*(a); *Dowdall v. Allan*(b). The contract, therefore, which wants these requisites and the insertion of these particulars required by the act, is wholly void. What are the terms of the insurance, or the nature of the liability, depends on the policy, and no other evidence of them can be given. How then can any decree be made, unless it be shewn, by a legal instrument, that the Defendants are personally liable to pay.

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Thirdly, the premiums which were due at the time of the loss had not been paid, and therefore no insurance then existed. Courts of Equity never relieve under such circumstances, and revive a contract for insurance after the loss has occurred. Except under the recent statute, it never relieves against forfeiture of leaseholds occasioned by their non-assurance.

Mr. *Southgate* and Mr. *Bevir* in support of the bill. First, the bill is framed on the authority of *Taylor v. Dean*(c), where the suit was instituted against seven members of the committee. The right to equitable relief and the mode of enforcing it, in cases like these, is shewn by *Hutchinson v. Wright*(d), followed in *Turnbull v. Woolfe*(e). In the latter case a decree was made, and on appeal the Lord Chancellor decided against the Plaintiff on the merits, but not on the jurisdiction. The

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(a) 4 *Ech.* 326.

(b) 19 *L. J. (Q. B.)* 41.

(c) 22 *Beav.* 429.

(d) 25 *Beav.* 444.

(e) 3 *Giffard*, 91.

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second point was argued in *Taylor v. Dean* (*a*), but the Court would not allow it to prevail upon demurrer. On this point they referred to *Pattison v. Mills* (*b*), where no policy had been executed. Thirdly, the non-payment of the premiums is provided for by the 16th rule: one calendar month is allowed for payment after it becomes due and notice given by the secretary, and the member is subject to a fine. The insurer therefore still remained a member and liable to all payments and entitled to all privileges.

Mr. Speed in reply. These Defendants are not alleged to be liable, and, for anything that appears, they may have paid everything due from them to the common fund; it is not alleged that they have not contributed every shilling for which they were liable to that fund, and there is no charge in the bill that they are liable to pay any part of the 250*l*. There is nothing to shew that these Defendants have power to compel the other members to contribute; the committee alone can do it. In *Taylor v. Dean* the objection arising under the statute of 35 Geo. 3, c. 63, s. 11, was not taken; that act does not appear to have been cited. *Hutchinson v. Wright* was a suit against the managing committee, who could compel contributions and payment; here the suit is against individuals who have no such power.

The Master of the Rolls reserved his judgment until he had heard the other demurrs.

The demurrs of the treasurer and secretary (*Williams* and *Tonkin*) were then argued. As to these Defendants
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(*a*) 22 *Beav.* 435—437.

(*b*) 1 *Dow. & Cl.* 342.

the following additional statements are necessary. Their duties were regulated by the following portions of the rules :—

“ 1. Its (the club's) affairs shall be managed by the members generally, assisted by a treasurer and secretary.”

“ 3. The treasurer shall keep the accounts of the club, collect all premiums, calls, fines and other items of income, and dispose of the same in accordance with the orders of the annual or other meetings; but he shall not disburse any of the funds, unless by order of such meetings respectively, signed by the chairman, secretary and at least four other members.”

“ 4. The secretary shall attend all meetings, and enter in a book the resolutions which, from time to time, may be adopted. He shall keep a record of all other proceedings, issue the notices necessary for convening meetings, preserve all letters, notices and papers received by him, and keep a copy of all correspondence carried on on behalf of the club.”

“ 5. The finance committee shall consist of three members, who shall examine the treasurer's accounts monthly, sign all cheques and see that the funds are duly appropriated.”

“ 9. The secretary, on receiving a requisition signed by five or more members, shall call a special general meeting,” &c.

“ 14. When the stock of the club is reduced below 5*l.* per cent., there shall be a payment of 10*s.* per cent. per quarter on the amount insured on each vessel ; and if

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if the funds are at any time found insufficient to meet the claims, the *Treasurer* shall be ordered to collect from each member such a per-centage as shall be deemed necessary."

The Plaintiff by his bill alleged, that he had applied to *Tonkin* and *Williams*, as secretary and treasurer of the club, and required them to pay or procure payment from the members of the club of the sum of 250*l.*, and to raise the necessary amount, out of the funds of the club or by contribution from the members thereof liable thereto, but that they had refused to pay the same. It also alleged that there was not, as far as the Plaintiff could discover, in the year 1860, nor at any other time, any finance committee appointed by the club, or any other committee by which the affairs of the club were managed.

The demurrs of the treasurer and secretary were then argued.

**Mr. Speed.** These Defendants are only servants or officers of a private partnership, and the secretary is a mere witness. You cannot make persons standing in such a situation parties to a chancery suit which relates to their principal and in which they are not interested; *Fenton v. Hughes* (*a*). The case of a corporation is an exception, their secretary, book-keeper or other officer may then be made a party, but merely for the purpose of making a discovery of the acts of the corporation, and which cannot be obtained on oath from such corporation; *Redesdale* (*b*). No relief can be had against

(*a*) 7 *Ves.* 287; and see *Few v. Guppy*, 13 *Beav.* 457; *Glyn v. Sonres*, 1 *Y. & Coll. Ex.* 644; *The Queen of Portugal v. Glyn*,

7 *Cl. & Fin.* 466; *Irving v. Thompson*, 9 *Simp.* 17; *Kerr v. Rew*, 5 *Myl. & Cr.* 154.

(*b*) *Pages* 188, 189 (4th ed.)

against these parties at the hearing, their duties are merely ministerial.

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**Mr. Southgate** and **Mr. Bevir, contra.** The duties of these Defendants, as appears from the rules, and the non-existence of a finance committee, render it necessary to make them parties, in order that the Plaintiff may have relief at the hearing. They have active powers and duties to exercise and perform in raising the contributions. By the modern practice, in bills against companies, the directors are constantly made parties; *The Great Western Railway Company v. Rushout* (*a*) ; *Simpson v. Denison* (*b*) ; *Munt v. The Shrewsbury Railway Company* (*c*) ; *Beman v. Rufford* (*d*) ; *Sturge v. The Eastern Union Railway Company* (*e*) ; *Allen v. Talbot* (*f*).

**Mr. Speed** in reply. If the Plaintiff be right, there is no case of a partnership, in which the clerks, shopmen and assistants may not be made parties to a bill against their employers. Here these Defendants have nothing to do except as agents of the club. The treasurer is (Rule 3) to keep accounts "in accordance with the orders of the meetings," and he can only disburse the funds by such an order countersigned by the chairman, &c. The secretary is (Rule 3) to attend the meetings and enter the resolutions.

The cases cited have no application, they were cases against corporations, which are admitted exceptions to the rule, or where there has been fraud or misconduct, or to restrain them from doing acts contrary to their duty.

(*a*) 5 *De G. & S.* 290.  
(*b*) 7 *Railw. Cas.* 403.  
(*c*) 13 *Beav.* 1.

(*d*) 1 *Sim. (N. S.)* 550.  
(*e*) 7 *De Gex, M. & G.* 158.  
(*f*) 30 *L. T.* 316.

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duty. In *How v. Best* (a) a demurrer of an officer of the *Bank of England* was allowed, he being a mere witness.

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*The MASTER of the ROLLS.*

These demurrs must be disallowed. Four objections have been taken to this bill, three are technical and the fourth is upon the merits. The first objection is, that the association is an illegal one; the second, that the Defendants are not personally liable to be sued; the third, that, at all events, the treasurer and the secretary cannot be sued; and the fourth is, that upon the facts stated the Plaintiff has no equity.

The state of the case is this:—The *St. Ives Shipping Insurance Club* was composed of a set of shipowners who joined together and put into a common fund sums of money proportioned to the amounts to be paid to them in case of the loss of their vessels. This may be called, and it was in fact, a mutual insurance; they were in the nature of a joint-stock company or partners in a particular adventure. Each member had a ship which was insured against loss for a certain sum, and to provide for the payment, each member paid a percentage into a bank or common fund.

It is suggested, that the statute of the 35 Geo. 3, c. 6, makes this an illegal association; but upon looking at the statute I am of opinion that it is not so. The statute was really intended to prevent gaming among underwriters, and has reference to the underwriting of policies.

(a) 5 Madd. 19.

policies. This case is not at all affected by the act, which does not make it illegal for the owners of ships to join together and contribute to a common fund to provide against the loss of their ships ; the cases cited, as *Strong v. Harvey* (a), shew that. Therefore, upon the nature of these associations, as stated in the bill and the rules affecting them, I do not see anything which makes it illegal for shipowners to enter into a joint adventure for providing, amongst themselves, for the loss of their ships. Whether it is, under these circumstances, necessary to have a policy appears extremely doubtful ; I should be inclined to think that it is not, but that point will be open to the Defendants at the hearing of the cause. At present it is not necessary to go beyond what the bill states.

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The second objection is, that the Defendants (other than the treasurer and secretary) are not the persons to be sued. It is true they are members of the association and they have agreed among themselves to contribute to the losses ; but it is said, that by the rules the association is to be governed by the finance committee, which is to carry on the whole business of the concern. The bill however alleges, that no finance committee has ever been appointed, and that, consequently, there is no body of management, and that being so, it is impossible to have any remedy against the association, except by suing the individual members.

The first question is, can you sue all the individual members, and if they were all made parties, what objection would there be ? It is to be observed, that unless I hold that the Plaintiff can sue all the members and that this association is not an illegal association,  
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(a) 3 Bing. (O. S.) 304.

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the only consequence would be, that the treasurer and secretary, if they have the control over the funds of the association, might put the whole into their pockets and retain them and tell the shareholders "we have nothing to do with you, you have no right of suit against us." The same objection would apply to any one of the other Defendants if he lost a vessel and came to have the insurance paid, the rest of the members and the treasurer and secretary might equally say "we have nothing to do with you, we will act and deal with the fund as we think fit." The object of the Defendants in raising this objection is, no doubt, by a side-wind, to avoid contesting the question of merits; but if I allowed it, the necessary effect would be, that it would depend upon the honor of the treasurer whether he put the money in his pocket or not. But I think that the other members might object and say, that he was bound to account and that they were entitled to have the funds of this association set apart and duly administered, according to the terms upon which they had contributed it. If that be so, provided all the members of the association were made parties, then this rule is well established :—that if they are so numerous that they cannot be made parties to the cause, with any chance of bringing it to a hearing, in consequence of abatements and the like difficulties, then you may make two or three of a class Defendants to represent the interest of all of that class. Formerly that was not the practice of this Court, but the rules have been modified and altered so as to suit the exigencies of modern practice, as was done by Lord *Cottenham* in several instances. But if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the Court.

It

It is obvious that this is not a case in which the Plaintiff could have sued on behalf of himself and all other members of the concern, because he is actually suing the concern, and his interest is in conflict with all the other members. It sometimes happens, that there is a class of members of a company who have a conflicting interest with the others; and then the Plaintiffs, if the class to which they belong are very numerous, put forward two or three of their body who sue on behalf of themselves and all the others of that class, and make the other persons who have conflicting interests, or some, on behalf of the rest if numerous, Defendants. This case comes within that rule; a few persons have been selected and made Defendants to represent the interests of the rest of the members, and consequently, in that respect, I think the bill is correct in form.

The next question is, whether the treasurer and secretary can be sued. This is certainly a question of more nicety and difficulty, as it does not appear by any allegation in the bill that they are members of the concern. But it is quite clear that they are part of the governing body, because the affairs are to be managed by the members generally, "assisted by a treasurer and secretary." Then it appears that the treasurer has got the funds of the company, and every member of the company has a right to know how the treasurer administers them, and in what manner he employs them, and the treasurer, on his part, is bound to account for the mode in which he has administered them. It appears from the statements in the bill, that the treasurer has acted in the matter upon his own authority, or upon the authority of some other member of the company, by refusing to receive certain moneys and refusing to pay certain other moneys. I think that the Plaintiff who makes a claim on the funds

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by her executors *Charlotte Beaumont* and *John Shapter*.

In 1847, the residue was ascertained and consisted of about 7,000*l.* Bank Annuities, which investment had never been disturbed or varied.

In 1852, *Charlotte Beaumont* by deed, not enrolled, assigned her reversionary interest in these Bank Annuities (specifically describing them as constituting the residuary estate of the testatrix), unto *John Shapter* and two other trustees, upon such trusts as she should by deed appoint, and in default, upon trust for two charities, which she described, equally.

She never executed the power of appointment, but by her will, dated in 1852, she confirmed the deed, and she gave the ultimate residue of her estate to the same two charities equally, and appointed the three trustees of the deed to be executors of her will.

In 1857, *Charlotte Beaumont* died. Mrs. *Wynn* survived her and died in 1862, and thereupon the trustees of *Jane Mary Beaumont's* will transferred the Bank Annuities into Court under the Trustee Relief Act.

The representative of the next of kin of *Charlotte Beaumont* now presented a petition, claiming the fund, and insisting that gift of it to charity was void under the Mortmain Act.

Mr. *Baggallay* and Mr. *Prendergast* for the Petitioner. As *Charlotte Beaumont* died in the lifetime of Mrs. *Wynn*, she never had an absolute interest in or complete control over the stock, she had merely a reversionary interest in a fund or residue, which, until the death

death of Mrs. *Wynn* in 1862, was liable to be laid out in real securities. Her interest in the fund therefore savoured of realty, and could not be devoted to charity by a deed not enrolled as directed by the statute or by will.

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This case is wholly different from one where a discretion, either of investing on real or purely personal securities, is given to the trustees of a charity. In those cases, the trustees are bound to exercise their discretion in such a way as will give effect to the charity. But here, the trustees were bound to exercise their discretion as to the investment of the fund on real securities for the benefit of Mrs. *Wynn*; and if they had invested it on real securities, it is clear that it could not have been given to the charities (9 Geo. 4, c. 36).

The rights, as between the next of kin and the charities, cannot depend on which way the trustees might think fit to invest the fund. The exercise or non-exercise of a trust or discretion by trustees never affects or varies the rights of the parties.

Mr. *Selwyn* and Mr. *Cotton*, for the charities, were not called upon.

Mr. *Dickinson* for the trustees.

Shadbolt v. Thornton (*a*) and *Edwards v. Hall* (*b*) were referred to; and see *Aspinall v. Bourne* (*c*) *Marsh v. Attorney-General* (*d*); *Graham v. Paternoster* (*e*).

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(*a*) 17 Sim. 49.
6 De G., M. & G. 74.
(*b*) 29 Beav. 462.

(*c*) 2 John. & Hem. 61.
(*d*) 31 Beav. 30.

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I really think there is nothing in this case.

Charlotte Beaumont did not know whether the fund would consist of pure personality or not. But she has in effect said "if I can give it to charity, I do so, but if I cannot so dispose of it I cannot help it."

It turns out that she can, and the two charities are therefore entitled to the fund.

SHEPPARD v. SHEPPARD.

Feb. 14.

A testator devised his real estates to trustees, upon trust, in the first place, out of the rents, issues and profits, to pay life annuities, "and, subject to the trusts aforesaid," to pay the residue of the rents, issues and profits to his four grandsons for life, and as any of them died, he devised his one-fourth of the real estates to their children in tail. Held, that the annuities were not charged on the *corpus* of the estate.

THE testator, by his will dated in 1815, after making a provision for his four grandsons, by name, out of specific real and his personal estate, gave and devised all other his real estate to trustees "upon trust, from time to time, *out of the rents, issues and profits* of the said devised hereditaments and premises, *in the first place, to pay one annuity*" of 60*l.* to his son for his life. The testator then proceeded as follows:—

"And upon further trust, by and *out of the rents, issues and profits* of the said devised hereditaments and premises, to pay unto each of my granddaughters *Sarah Caroline Sheppard, Caroline Sarah Wilson* (the Plaintiff) and *Charlotte Walls Sheppard*, one annuity or clear yearly sum of 25*l.* a piece, for and during the terms of their respective natural lives," &c. And he directed his trustees to pay the property tax and legacy duty on the annuities out of *the rents and profits* of his real estate; "and, subject to the trusts aforesaid, upon further trust that my said trustees," &c. "do and shall, during

during the respective natural lives of my said grandsons, pay and apply *the residue of the rents, issues and profits* of my said real estates, in and towards their support and maintenance and for their benefit and advantage, in equal shares and proportions ; and when and as any of my said grandsons shall respectively depart this life, I give and devise an equal undivided fourth part or share (the whole into four parts or shares being divided), of the entirety of my said hereditaments and real estates unto the respective child or children of each of my said four grandsons and the heirs of their respective bodies."

The trustees had a power to sell the estate for payment of debts and legacies.

The testator died in 1816, and the only fund available for the payment of the annuities was 1,394*l.* £3 per Cents., standing in Court to the credit of "the annuitant's account," and a sum of 550*l.* 13*s.* 2*d.*, the dividend received upon a debt due from a trustee who had become bankrupt.

This was a petition of *C. W. Sheppard*, the survivor of the three granddaughters, whose annuity was considerably in arrear, and she now claimed payment of the arrears of her annuity, both out of the income and *corpus* of the fund in Court.

Mr. Hobhouse and Mr. Fry in support of the petition. First, there is an unlimited charge on the rents for payment of the annuity, and this amounts to a charge of the *corpus* ; *Foster v. Smith* (*a*) ; and see *Phillips v. Gutteridge* (*b*). Secondly, the gift to the annuitant "is in

(*a*) 1 *Phill.* 632.

(*b*) 32 *L. J. (Chanc.)* 1.

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in the first place," and that to the grandsons and their children made expressly "subject to the trust aforesaid," and is of "the residue," they can therefore take nothing until the annuities have been fully paid; *Playfair v. Cooper* (*a*).

Mr. Selwyn, for the grandsons and their representatives. These annuities are merely charged on the "rents, issues and profits" accruing during the lives of the annuitants. The testator not only considered that the rents would be sufficient for that purpose, but that there would be an excess or *residue* of such rents, which he gave for the maintenance of his grandsons. Again, the testator made the great grandchildren tenants in tail of the estates, no construction can therefore be admitted which would defeat those interests. The words "subject to the trusts aforesaid" do not extend the prior gift, and they are applicable to the rents, issues and profits only; *Stelfox v. Sugden* (*b*). The prior excess of income is not applicable to the payment of the arrears; *Darbon v. Rickard* (*c*).

Mr. Hobhouse in reply. The testator intended that the grandchildren should succeed to their parents' share, they therefore take in the same way and subject to the same annuities. The word "subject" applies both to the surplus income given to the parents and to the estate given to their children.

The MASTER of the ROLLS.

I am of opinion that the income only is charged with the annuities. The trust is distinct, "out of the rents, issues

(*a*) 17 Beav. 187.(*b*) John. 234; and see 30Beav. note (*n*), 519.(*c*) 14 Sim. 537.

issues and profits thereof" to pay the annuities, and the property tax and legacy duty are to be paid in the same manner out of the "rents and profits." And subject to the trusts aforesaid, the testator directs the trustees to pay "the residue of the rents, issues and profits" to the grandsons; this shews that he is dealing only with the rents and profits, and that the words "subject to the trusts aforesaid" are confined to the rents and profits. When the gift over takes place it is a gift in tail of the whole *corpus*. I agree that the great grandchildren who are named take subject to the annuities; but I should require some strong words to shew that the annuitants could sell the estate and defeat the estate tail of the great grandchildren. Such a question never arose in the mind of the testator as a deficiency of his estate to pay the annuities occasioned by bankruptcy of one of the trustees. This cannot alter the construction of the will. The annuitants are entitled to say that all the income is now liable to pay both the annuities and all the arrears, but this is all. There must be an inquiry as to what is due and how much of this fund is capital and how much income, and I must declare that the income only is applicable to the payment of the annuities and arrears.

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***Re THE COMMERCIAL DISCOUNT COMPANY
(LIMITED).***

Feb. 14.

The Court will not, upon the hearing of a petition to wind up a company, enter into a contest as to the person to be appointed Official Liquidator, and it will not appoint one, on that occasion, unless with the concurrence of all parties.

Costs of a second petition to wind up allowed, under the circumstances.

ON the 23rd of *January*, 1863, Mr. *Cooper*, a shareholder, by the solicitors of the company, presented a petition to wind it up.

An extraordinary general meeting was held on the 2nd of *February*, when resolutions were passed for voluntarily winding-up the company and for appointing Mr. *Cooper* one of the liquidators, with a commission on the moneys received.

On the 3rd of *February*, Mr. *Drage*, a shareholder and creditor of the company, presented a second petition for winding it up, and praying that Mr. *Hart* might be appointed official liquidator, and affidavits were filed to shew his fitness for that office. The two petitions now came on for hearing, when the necessity for winding it up was not contested.

Mr. *Hobhouse* and Mr. *Beavan*, in support of *Cooper's* petition, asked for the usual order.

Mr. *Baggallay* and Mr. *J. N. Higgins*, in support of *Drage's* petition, asked, first, that the order might be made on their petition, the Petitioner being unconnected with the managers of the company and not appearing by its solicitors; secondly, that *Hart* might be appointed official liquidator (8th General Rule of 11th of *November*, 1862); and thirdly, that the Petitioner might have the costs of the second petition.

Mr.

Mr. *Roxburgh*, for some creditors, objected to the appointment of Mr. *Hart*.

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Mr. *Selwyn*, for the company, contended that the second petition was unnecessary, and he objected to the order asked by *Drage*.

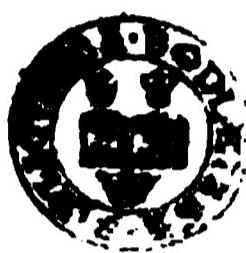
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I have a great objection to more than one petition being presented, it only leads to unnecessary litigation. I can make only one order and that on the first petition. I am convinced that by one petition, although presented by the solicitor of the company, the concern may, if the proceedings are carried on *bonâ fide*, be wound-up as well, as if the petition had been presented by one who is not the solicitor of the company. But considering that, after the presentation of the first petition, the Petitioner accepted the office of official liquidator, I think that the second Petitioner had sufficient reason to suspect that there was a probability of the first petition not being duly prosecuted. I therefore think that there was a sufficient justification for his presenting the second petition, and although I shall make but one order and give the carriage of it to the first Petitioner, I think the second Petitioner should be allowed his costs.

I object very much to the practice, which seems to have been suggested by the 8th of the General Orders of November, 1862, which was framed with great care, of praying, in the petition to wind-up a company, that a particular person may be appointed official liquidator. The object of the order is simply this:—to enable the Court, when all the parties are agreed as to the propriety of making the winding-up order, and as to the selection

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selection of the person to be official liquidator, to appoint one at once, and thus hasten the matter and carry on the winding-up more rapidly. But the object of the order now suggested is, to transfer into Court the contest for the appointment of an official liquidator, a matter peculiarly fitted for Chambers. Though as this is a new matter, I do not intend to make the second Petitioner pay the costs of the affidavits on that subject.

For the future I will not, on the hearing of petitions to wind-up companies, allow any contest to take place as to who is to be the official liquidator; but if I make the order to wind-up and all parties concur, and there is no doubt of the fitness of the person proposed, I will make an order for his appointment.

WINDOVER, v. SMITH.

Jan. 29, 30, 31.

Distinction between the two acts relating to the copyright of design (5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 75). The first applies to new designs for the ornamentation of articles, the second to new designs of articles of utility.

ACCORDING to the statement of the Plaintiff, he had, some time previous to *October*, 1859, "invented and perfected a new and original design for the shape or configuration of the body of a certain four-wheeled carriage called a *dog-cart phaeton*. On the 19th day of *October*, 1859, and before any publication of his design, he caused the same to be duly registered at the office of designs in *London* pursuant to the 6 & 7 Vict.

A design of a carriage was registered under the 6 & 7 Vict. c. 75. The inventor claimed four things as new, and as conducive to the "utility" of the design. There was no novelty as to three of them, and they did not contribute to the "utility." The fourth tended to its utility, but was the mere extension of a well-known principle. Held, that the claim to monopoly could not be supported under the above act, and that the design was not protected under the former act (5 & 6 Vict. c. 100), as an ornamental design, it not having been registered under that act.

Vict. c. 65 (a), and he thereupon obtained from the registrar of designs the usual certificate of registration.

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The Plaintiff, upon the registration of his design, furnished the registrar with drawings, together with the title and description of the design. The bill contained a copy of such drawing, and stated that the title of the design was "*Windover's Registered Dog-cart Phaeton*." According to the drawing, it consisted of an open four-wheeled carriage with double seats back to back. The fore-wheels were of considerable size, and the body of the carriage was curved underneath, so as to allow a space for the fore wheels to pass under the body of the carriage.

The description of the design was as follows :—

"The purpose of utility to which the shape or configuration of the new parts of this design have reference is, that much higher front wheels can be used, or closer coupling is effected and a saving in horse power.

"The carriage is built with a double-curved arch, as shewn at 4.—1, the seat, 2, the opera board, 3, the boot, and 4, the curved arch under which the wheels turn.

"The

(a) The 6 & 7 *Vict. c. 65*, after reciting that, by the 5 & 6 *Vict. c. 100*, "there was granted to the proprietor of any new and original design" the sole right to apply the same to the ornamenting of any article of manufacture," and that it was expedient to extend the protection afforded by the said act to such designs hereinafter mentioned, not being of an ornamental character, as are not included therein, enacts as follows :—

"And with regard to any new or original design for any article of manufacture having reference to some purpose of utility, so far

as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape or configuration or only for a part thereof, be it enacted, that the proprietor of such design, not previously published within the United Kingdom of *Great Britain* and *Ireland* or elsewhere, shall have the sole right to apply such design to any article, or make or sell any article according to such design for the term of three years, to be computed from the time of such design being registered according to this act."

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"The parts marked 1, 2, 3 and 4 are new, the rest is old, so far as regards the shape and configuration thereof."

The Plaintiff instituted this suit against the Defendant in June, 1862, complaining that the Defendant had, for some time past, been making and exposing for sale and selling divers of the said carriages called *dog-cart phætons*, made according to and in imitation of the Plaintiff's design, and in direct piracy and infringement of the Plaintiff's sole and exclusive rights under the registration of his said design.

The bill prayed for an injunction, for the delivery up of the pirated articles, for an account of profits and for damages.

The case now came on upon a motion for a decree.

Mr. *Selwyn* and Mr. *Bevir* for the Plaintiff. The Defendant insists that the Plaintiff's registration is invalid and ineffectual; but that is not the case. The shape and configuration of the carriage are new, and the whole, when combined, is conducive to the purposes of utility. The validity of the Plaintiff's exclusive right cannot be determined by a consideration of the carriage in its component parts, for the new and original design consists in the combination of the whole. The whole together is also useful and ornamental, and, as a design, it is protected by the 5 & 6 Vict. c. 100.

Mr. *Baggallay* and Mr. *Shebbeare* for the Defendant. If the Plaintiff relied on the ornamentation of the carriage, he ought to have registered it under the first act (5 & 6 Vict. c. 100); but his registration is under the

the second act (6 & 7 Vict. c. 65), and his right is therefore confined to a new and original design of an article of utility.

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The first act relates to a "new and original design," which is "applicable to the ornamenting of any article of manufacture," and which is "applicable for the pattern or for the shape or configuration or for the ornament thereof." The second act applies to a different subject; it is for the protection of a "new and original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article."

The Plaintiff claims four things, but the utility of the registered article is confined to the increase of the fore-wheels, effected by means of an arch in the body of the carriage, which allows them to pass under it during the turning of the carriage. But this is not new, it is the old mode by which such an object has always been effected. It is a question of utility and not of beauty that the Defendant has been brought to meet. Three of the items claimed as new being confessedly old, invalidates the Plaintiff's right; *Morgan v. Seawan* (*a*); and the whole of the components being old, the whole of them are not protected by the statute; *Norton v. Nicholls* (*b*).

Secondly, the time granted by the statute for protection of designs has now expired, and no relief can therefore be granted; *Smith v. The London and South Western Railway Company* (*c*).

Mr. Selwyn in reply. The word "utility" in the 6 & 7 Vict. c. 65, s. 2, has reference to the "article" and not to

(*a*) 2 Mee. & W. 562.
(*b*) *Ellis & Ellis*, 761.

(*c*) 1 Kay, 415.

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to the "design." It is the new shape and configuration that is protected.

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After the fullest consideration of this case, I am of opinion that the Plaintiff fails in establishing the novelty of his invention according to the terms of the registrar's certificate.

It is a question depending in some degree on the construction of the statute, and it is proper to refer to the two acts which relate to the subject, namely, the 5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 75. The object of both is to give to the discoverer of a "new and original design" a temporary monopoly. The first relates to designs "applicable to the ornamentation of an article of manufacture," the second to designs "for any articles of manufacture having reference to some purpose of utility;" both may be for the "shape or for configuration" of the design. I have no doubt that the two acts must be construed together, and that a design in which both beauty and utility are combined may be registered under either and probably under both the acts. But when it has been registered, the Court is bound to look at the purpose and object of the design which has been registered. The patent law does not apply to these cases, but there is this analogy between them:—the patent law requires that an invention should be accurately described; and, under these acts, the nature and object of the design must appear on the certificate of registration (a).

When I come to look at this matter, I find that the article registered is a "*dog-cart phaeton*," and that

(a) 6 & 7 Vict. c. 65, s. 8.

that the “purpose of utility” is thus described:—“The purpose of utility to which the shape,” &c., [see *ante*, p. 201]. No doubt this phaeton is, at first sight, of a very agreeable and elegant form, and I think its beauty is not exaggerated by the Plaintiff. The novelties claimed consist of four things, first, the seat, secondly, the opera board, thirdly, the boot, and fourthly, the curved arch under which the fore-wheels pass while the carriage is in the act of turning. The purpose of utility is thus stated :—“that much higher fore-wheels can be used or closer coupling is effected and a saving in horse power.” Now the part marked number 1, which is simply the seat, obviously does not tend to enable you to use higher wheels, which is the utility claimed by this discovery; the second is the opera board, and the evidence shews that there is no novelty whatever in this; it is of considerable advantage in assisting a person to lift himself up in getting into the carriage, and it may also be a protection against the pole of a carriage following behind it. But it is not new; and even if it were, it is no part of the purpose of utility claimed, which is simply, the enlargement of the fore-wheels, the closer coupling and the saving of horse power, and it is obvious that this opera board does not, in the slightest degree, conduce to either of these objects.

No. 3 is the boot, which does not contribute to the utility claimed. The only thing which does contribute to it is number 4, which enables a larger wheel to be used, and this I think is a matter of considerable utility. I do not go into the question whether the fact of three out of the four items not being conducive to some purpose of utility would of itself vitiate the registration, as it would in the case of a patent; I assume that it would not.

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The question really is, whether the curved arch can be considered such a novelty as to entitle a person to register it under the acts, and I am of opinion that it is not. I have no doubt that it is useful, but it is the common case of the Plaintiff and Defendant that these arches existed before. I have, since the argument, looked in coach makers' shops and have not discovered one phaeton without such an arch, and it is the common case that they always did exist, to enable the front wheels to pass under the carriage in turning.

In the present case, the front wheels are five or six inches higher than the ordinary size, which is extremely beneficial, and this is effected by having a larger arch. But it is impossible to say that the application of the same thing, for the same purpose, can be made the subject of registration as a new and original design. There is no novelty in making the front wheels a little larger by increasing the arch, they are always in proportion to each other, and the size of wheel must be limited by the size of the arch.

It was argued that the four matters claimed as new, when put together, formed a new design of great beauty in shape and configuration ; but it was pointed out to me that this was not the case which the Defendant was called on to meet, the result is, that I am compelled to say that I cannot afford the Plaintiff any relief, and that his bill must be dismissed with costs.

After the recital in the second act, that it is expedient to extend the first act "to such designs thereinafter mentioned as are not included in the first act, not being of an ornamental character," I feel satisfied, that the design referred to in the second act means one of an article having reference to some purpose of utility and not merely of ornamentation.

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PARISH v. PARISH.

Jan. 15, 16.

THIS suit was instituted by a son against his father to obtain a transfer of eleven shares in the *Agra Banking Company*.

It appeared that, in 1847, the Defendant was the owner of thirty-one shares, and the Plaintiff alleged, that in *December*, 1847, the Defendant agreed to sell him eleven of such shares for 500*l.*, which sum he alleged he had accordingly paid. The agreement was by parol only, and the fact of such sale having been made was contested by the Defendant. It however appeared by the evidence, that on the 2nd of *December*, 1847, the Defendant had written to the secretary of the bank at *Agra*, desiring him to transfer eleven of his shares to the Plaintiff, and that the Plaintiff had also, at the same time, inclosed instructions as to the appropriation of the dividends on those shares.

The secretary answered on the 31st of *January*, 1848, that he was unable to do so, having a certificate for four shares only, and asking the Defendant to send certificates for the other seven, when his wish would be complied with. The Defendant sent the secretary's letter to the Plaintiff, who was in *America*, with an indorsement thereon written by the Defendant, which was as follows:—"These eleven certificates I shall send forthwith. I have received the balance, 33*l.* 9*s.*, for my last half-year's dividend up to 31st *December*, 1847. The half-year's now going on, which will be due *June*, or 30th, and which I shall receive about *September* or

October,

The testimony of a claimant alone cannot be acted on, unless there be some corroborative evidence.

The Plaintiff asserted that he had contracted to purchase some shares from the Defendant, but the contract was not in writing, the fact was contested and it was proved by the Plaintiff alone. There was, however, proof that the Plaintiff had paid the Defendant money, but on what account did not appear, and that the Defendant had admitted, in writing, that the shares belonged to the Plaintiff, though they had not been transferred for fourteen years. Held, that the contract was sufficiently proved.

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October, if your proportion should come with it, I will calculate and pay into Currie's, as very likely the bank will not have transferred the eleven shares to you till they have received these certificates."

On the 4th of *October*, 1848, the secretary sent to the Defendant the half-yearly account of the bank to *June*, 1848, shewing the amount of dividend on the whole thirty-one shares. This account the Defendant forwarded to the Plaintiff, and in the columns referring to the thirty-one shares was written, in the Defendant's handwriting, "*of these, eleven are your shares.*"

There was an indorsement on the account, in the Defendant's handwriting, containing the following passages:—"Your portion I calculate is 24*l.* 15*s.* up to *June 30th, 1848.*" Then followed the calculation of the proportion of the dividend produced by eleven out of the thirty-one shares. "And your shares (eleven) produce 24*l.* 15*s.*," &c. "Preserve this statement, it is a voucher for the number of our shares. They have not made a separate account for you," &c.; "you know that eventually they will all be yours."

The Plaintiff returned to *England* in *June*, 1851, when he urged the Defendant to transfer the eleven shares, but the Defendant excused himself, holding out that the Defendant would take the whole of the shares and other property under his will.

The fact of the payment of the consideration for the purchase of the shares was disputed by the Defendant, but the Court was of opinion, from his books of account, that the Defendant had received from the Plaintiff 385*l.*, though on what account did not distinctly appear.

The

The Plaintiff filed his bill in *December*, 1861, and prayed for a specific performance of the contract, for a transfer of the eleven shares, and that the Defendant might account for the dividends.

Mr. *Selwyn* and Mr. *Tripp*, for the Plaintiff, argued that the contract and payment of the consideration were proved by the evidence of the Plaintiff and the written acknowledgment of the Defendant; that the Plaintiff was, therefore, entitled to a transfer of the shares, and that the Defendant was a mere trustee of them for his son.

Mr. *Baggallay* and Mr. *De Gex*, for the Defendant, argued that there was no proof of any contract for purchase except the bare testimony of the Plaintiff, and that no dividend had ever been paid to him. That the written documents pointed rather to an intention to transfer the shares voluntarily by way of gift, than to a contract of sale. That, in that view of the case, the gift was incomplete and ineffectual, and that there was no declaration of trust on which the Court could act; besides which, that this was not the case made by the bill. They also urged that the lapse of time and the laches of the Plaintiff in filing his bill had disentitled him to any relief.

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I am of opinion, after reading over these papers, that the Plaintiff is entitled to a decree. The case stands thus:—the written statements made by the Defendant upon two occasions, and especially the indorsement on the document of the 4th of *October*, 1848, shew in the most conclusive manner that the Defendant considered that

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the Plaintiff was entitled to the eleven shares in the *Agra Bank*. In what character was the Plaintiff entitled to those eleven shares? He was either entitled to them by virtue of a voluntary gift of them by his father, or as a purchaser for valuable consideration. If by gift from the father, there is, in my opinion, amply sufficient on this memorandum to shew that the father treated himself as a trustee of the shares, although they had not been transferred, and that it was not a mere contract to be performed or one remaining *in fieri*.

But the Plaintiff says, that it was a purchase of the eleven shares for 500*l.*, although that was not the full value of them. On looking into the books of account, it appears clearly that the father had, at that time, received from the son 385*l.*; but the son says that he had paid 500*l.* Whatever the arrangement was by which these shares were to be transferred to the Plaintiff, it appears to have been not in writing, but to have rested on parol only. The amount of money does not appear to me to be very material, because 385*l.* would constitute as good a consideration for the purchase of these shares as 500*l.*

The next question is, in what character was this money paid? It does not appear to have been ever repaid by the father. The son says that it was paid as a consideration for the shares; why am I to doubt that assertion? Here is a sum of money paid to the father and which is never repaid. The father, after that or contemporaneously with it, says to his son, "the shares are yours," and he gives a direction to the secretary of the bank to transfer them into his son's name; that could not be accomplished, but he says nevertheless, it does not matter, preserve this statement, it is a voucher for our number of shares, and that I have twenty

twenty and you eleven. Am I to disbelieve the whole of this because it is not specifically mentioned that the payment was made in respect of those eleven shares?

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Mr. De Gex pressed upon me the rule which I am in the habit of enforcing very strictly, that the sole testimony of a person applying to prove a debt, unsupported by any other testimony, is not such evidence as the Court can act upon. That undoubtedly is the rule which I invariably follow, and which I have found absolutely necessary; but I am at a loss to know how it applies to this case. I will illustrate what I mean by giving an instance. Under a decree for the administration of a testator's estate, a person comes in and says the testator owed me 1,000*l.* He swears to that fact, but his is the only evidence. In that case, I could not act on such unsupported evidence, for any other man might equally come and swear the same thing. But supposing that, in addition to his assertion, he proves that the 1,000*l.* was paid to the testator, at the time stated, by the bankers of the claimant, am I not to allow the debt? Go a step further and take the present case, and suppose that 385*l.* is proved to have been paid to the Defendant by the Plaintiff, who says it was paid in respect of the purchase of the eleven shares, and that you have the Defendant, at the same time, by writing under his own hand, acknowledging that the Plaintiff was the owner of eleven shares, why am I not to couple those circumstances together? It is what in the Ecclesiastical Courts they used to call "the ministerial evidence," that is, the corroborative evidence and which props up and supports the allegation of the Plaintiff. It is true, that whenever the oath of the Plaintiff alone supplies one particular link in the evidence which is wanting, that particular link is unsupported and must be rejected if it be not confirmed by any evidence but

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his own; but if it be confirmed by all the surrounding circumstances proved in the case, then it is supported by what I hold to be corroborative testimony. If I were not to adopt that rule, it would lead to this:—that I should never take a claimant's testimony, unless the case were conclusively proved by other evidence, in which case it would not be required. That is not what I mean, and I therefore thought it desirable to explain my meaning.

Here I have the proof of the payment of the money, I have the statement of the Plaintiff that it was paid in respect of the purchase of these shares, and I have also proof that the father acknowledged that the person who paid him that money was the owner of the shares. If I couple these three things together, I must come to the conclusion that the money was paid in respect of the purchase of those shares, and unless the Plaintiff has done something to forfeit his right, I think he is now entitled to have those shares.

The next question is, whether the Plaintiff has done anything to forfeit the right, which he possessed in 1848, to those shares. He is now coming in 1862, never having received but one dividend or rather an acknowledgment of his right to one dividend, which is the same thing. I think there is quite sufficient to explain the delay. In the first place, it is a transaction between father and son, the father by an indorsement on a document says, the transfer of the shares is not very material, "you know that eventually they will all be yours," what does that mean? It means I will give them all to you by will. Would not any son be satisfied with that statement of his father, even though the father did not pay the dividends to him, he might not have wished to press him. I have no evidence as to what wills the father made previously to 1857, but I have evidence

evidence that in 1857 the father intended to give the shares to the son, that therefore the expression of his intention expressed in *October*, 1848, existed nine years afterwards, in 1857, and I therefore conclude that it existed during the whole of the interval. I think that this and the relation that existed between father and son, is a sufficient reason for the son's not coming to the Court before to enforce his rights. But the state of circumstances becomes entirely altered when the father says "I deny that you are entitled to the shares at all," and when he says that, the son immediately takes proceedings to enforce his right to the eleven shares and institutes this suit.

I think, therefore, that the Plaintiff is entitled to those shares, which the Defendant must transfer, and he must account for the dividends, but I cannot give him any costs of this suit.

NOTE.—Affirmed by the Lords Justices.

SHARPLES v. ADAMS.

IN 1856, the Defendant *Samuel Adams* was declared bankrupt, and in *October*, 1856, part of his estate, consisting of some freehold land at *Ware*, was sold by his assignees to *Fuller Coker* for 209*l.* Although the fact was contested, yet for the purpose of the decision, the Court assumed that *Coker* had made the purchase as a trustee for *Adams*. In *February*, 1857, the property was conveyed by *Adams* and his assignees to *Coker* in fee.

In *June*, 1858, *Coker* deposited his conveyance with the

1863.

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PARISH

v.

PARISH.

*Feb. 18, 19.*

The priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all.

ES IN CHANCERY.

ankers, as a security for 150*l.* and hem. Whether this had been done and concurrence of *Adams* was a ; but the Court came to the con-  
een done with *Adams'* knowledge admitted, that in September, 1859,  
ed of the deposit, and, his bank-  
annulled in March, 1860, he, in  
ted a suit against *Coker*, but without  
ts parties, to obtain a conveyance  
m *Coker* under the alleged trust.  
upt, and his assignees having dis-  
uly, 1861, conveyed the legal estate  
*Adams*.

umstances, the Plaintiffs instituted  
*Adams* alone, insisting on their priority  
g that the Defendant might redeem  
d.

id Mr. A. G. Marten argued that  
riority over the Defendant although  
estate; first, because the evidence  
osit had been made to the Plaintiffs  
and assent of the Defendant; and  
the subsequent acquisition of the  
t, under the circumstances of this  
his and priorities of the parties;  
*Colyer v. Finch* (b); *Clack v.*

*the Rolls referred to Willoughby*  
d *Evans v. Bicknell* (e).]

Mr.

- 5 H. of (c) 19 Beau. 262.  
(d) 1 Term Rep. 763.  
(e) 6 Ves. 174.

Mr. Selwyn and Mr. C. H. Smith for the Defendant. The evidence shews that the equitable mortgage was created without the knowledge of the Defendant. The Defendant had the prior equity under the original agreement, and he has obtained the legal estate. Under such circumstances he has the prior right to the estate; *Joyce v. De Moleyns* (*a*); *Roberts v. Croft* (*b*); *Hunt v. Elmes* (*c*).

Mr. Southgate was not heard in reply.

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### *The Master of the Rolls.*

I am quite clear that this case depends, first, upon whether Mr. Coker was in fact originally a trustee for Mr. Adams; and secondly, if he was, whether Mr. Adams sanctioned and knew of the deposit by Coker of the purchase-deed with the Plaintiffs, for the purpose of raising 150*l.* and of securing any balance which might be due from time to time to the Plaintiffs.

Feb. 19.

I will not go into the question of whether, upon the sale of this property, Coker was or was not a trustee for Adams; I assume that to be the case. In that view of the case, I do not think that anything turns upon the possession of the legal estate. I do not think that Mr. Adams would gain anything by obtaining the legal estate, upon the assumption that the purchase was made for him, or by reason that the assignees of Coker who could have contested it, had assigned all their interest over to him, for, on this assumption, his was the first equity.

I fully concur in the observation, that there is often

a

(*a*) 2 *Jones & Lat.* 374.  
(*b*) 2 *De G. & J.* 1.

(*c*) 27 *Beav.* 62, and 2 *De Gex, F. & J.* 578.

1863.  
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SHARPLES
v.
ADAMS.

1863.
 ——
 SHARPLES
 v.
 ADAMS.

a great misapprehension as to the value acquired by obtaining the legal estate. The case of *Willoughby v. Willoughby* (a), referred to, is one in which Lord *Hardwicke* goes fully into the matter. I may illustrate it in this way:—if the owner in fee simple, having the legal estate, creates an equitable charge in favor of *A.*, and afterwards a second equitable charge in favor of *B.*, and then a third equitable charge in favor of *C.*, I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to *C.*, the owner of the third equitable charge, would not affect the rights of the first or second (b). It is true that if the legal estate is outstanding in a third person having no privity with the others, then the person who gets the legal estate would get priority; but where the person having the legal estate holds it in the character of trustee for them all, he cannot prefer either or create a priority, by giving the legal estate to anyone in particular. I do not think that question arises here, and I merely state this for the purpose of removing a misapprehension which appeared to me to exist in the argument as to the possession of the legal estate. But on the assumption I have made, that *Coker* was a trustee for *Adams*, he would have the prior equity, he would be entitled to exclude the Plaintiffs, unless he sanctioned the deposit with them.

[His Honor, after examining and weighing the evidence, proceeded:]—Upon the evidence I am bound, therefore, to consider that the advance made by the Plaintiffs to *Coker* was sanctioned by *Adams*, and the Plaintiffs are therefore entitled to the decree which they ask.

As

(a) 1 *Term Rep.* 763.

Kay & J. 617; *Sturgis v. Morse*,

(b) See *Prosser v. Rice*, 28 *Beav.* 68; *Carter v. Carter*, 3

3 De G. & J. 1.

As I have come to the conclusion that he knew of and sanctioned it, the Plaintiffs may either have a decree for foreclosure or for a sale. In the latter case, the Plaintiffs are entitled to have against the Defendant, personally, so much of the costs of the suit as the produce of the sale may be insufficient to pay. But if the Plaintiffs take a foreclosure decree, they must add their costs to their security.

1863.
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SHARPLES  
v.  
ADAMS.

BONFIELD *v.* HASSELL.

Jan. 16.

THE testator executed a voluntary deed, dated the 5th of *October*, 1852, by which he covenanted to pay a lady named *Emily Goode* an annuity of 100*l.* "for and during the natural life of *Emily Goode* until she shall be declared a bankrupt, or take the benefit of any act of parliament for the relief of insolvent debtors, or shall assign or dispose of the said annuity or yearly sum, or do any act whereby the same or any part thereof shall be vested or become liable to be vested in any other person."

A voluntary deed, though retained by the grantor until his death, held valid.

In 1852, A. B. voluntarily covenanted to pay an annuity to C. D. until she "should do any act whereby the same or any part thereof should be vested or become liable to be vested in any other person." She married in 1859, but it did not appear that the husband had, in any way, interfered with the annuity. Held, that, by the marriage alone, she had not forfeited the annuity.

The testator retained the deed in his own possession until his death. But he signed a memorandum, addressed to a friend, desiring the bond to be handed over to him, "in case of his death," for the protection of the annuitant. The deed and memorandum were sealed up by the testator in an envelope, outside of which was indorsed a memorandum, signed by the testator, requesting that, in case of his death, it should be opened by the friend above referred to.

On the 29th of *March*, 1859, *Emily Goode* married Mr. *Bonfield*.

The

1863.  
 —  
 BONFIELD  
 v.  
 HASSELL.

The testator regularly paid the annuity from 1852 to *Michaelmas*, 1861, and he died on the 25th of *December*, 1861. His executors, having insisted that the annuity had ceased by the marriage, Mr. and Mrs. *Bonfield* instituted this suit against the executors, praying a declaration of their right to and for payment of their annuity.

Mr. *Selwyn* and Mr. *Freeling*, for the Plaintiffs, argued that marriage was no forfeiture of the annuity, for *non constat* that the husband would ever reduce it into possession during his life. They cited *Avison v. Holmes* (*a*) and *Lumley v. Croft* (*b*), in which it was held that a warrant of attorney given by the lessees, though it might lead to a charge on the leasehold, was not such a charge as to create a forfeiture of the lessee's interest.

Mr. *Prideaux* and Mr. *Druce* for the executors. First, the deed was kept in the testator's possession from 1852 to his death in 1861; there was no unconditional delivery of it, and therefore it operated merely as an escrow. Secondly, on the construction of the deed, marriage was such an act of the lady as to determine the annuity, for thereby the annuity or some part of it became vested or liable to be vested in her husband. We concede that the annuity did not vest by marriage, and that it could only become the property of the husband by being reduced into possession. The law is, that marriage is a gift to the husband of the wife's *chooses in action*, on condition that he reduces them into possession; *Co. Lit.* (*c*); *Bright on Husband and Wife* (*d*). The husband might receive the annuity, at least during the

(a) 1 *John. & Hen.* 530, and  
 see p. 540, note.  
 (b) 6 *H. of L. Cas.* 672.

(c) *Page* 351.  
 (d) *Vol. 1, p. 36.*

the **coverture**; *Stiffe v. Everitt* (*a*); and therefore, by the marriage, some part became liable to vest in him, and this Court would not prevent his obtaining payment or settle a mere life interest; *Tidd v. Lister* (*b*).

1863.  
—  
BONFIELD  
v.  
HASSELL.

*The Master of the Rolls.*

[Without hearing a reply]—I am clear that the wife is still entitled to this annuity. The first question is, what is the effect of the execution of the deed? and I think that there was a valid execution of it, and that the mere fact of the grantor retaining it in his own possession did not affect its validity.

In *Fletcher v. Fletcher* (*c*) a testator had entered into a voluntary covenant with trustees to pay a large sum of money, to be held in trust for his sons. He retained it in his possession down to his death, without having communicated its contents either to the trustees or the *cestuis que trust*, yet the Court held that it was a perfectly valid deed.

I am disposed to think that the most favorable view for the Plaintiffs would be, to assume that it was an escrow, to be acted on by his friend at his death for the protection of the annuitant, according to desire expressed on the envelope. If that were the true construction, what would be the effect of it? It is obvious that the deed would speak from the day of his death, and if so, the acts which were to put an end to the annuity must be acts to be done after the settlor's death, in which case, it is obvious that this lady has done no act since that time which would forfeit the annuity.

This

(*a*) 1 *Myl. & Cr.* 37. 867.

(*b*) 3 *De G., M. & G.* 857, (*c*) 4 *Hare*, 67.

#### CASES IN CHANCERY.

is a more favorable view of the case than the take, which is, that the deed was operative ie 5th of *October*, 1852. I next come to consider r her marriage after that period was an act by the annuity "became vested or liable to be in any other person," that is the only question rtance. Now one thing is obvious, that the settlor . so consider it, because he continued to pay the / for two and a half years after her marriage, for . it down to *Michaelmas*, 1861, so that for two half years he treated the marriage as no forfeiture annuity. That, however, would not affect the ictio to be put upon the words of this deed.

is admitted :—that the annuity does not, by the marriage alone, become vested in the husband. it liable to become vested in any other person, it is possible that the growing payments may to the husband, who is capable of giving valid ges for them. But I am of opinion that the deed o be construed most strongly against the grantor, this instance, the annuity has not as yet become or become liable to be vested in any other person. ufruct, for a period of uncertain duration, may vested in the husband, that is to say, he may valid discharge for the payment. But I think e Court would, on the application of the wife, the husband of the greater portion of it, and if nted, would settle the whole of the annuity on e independently of him.

nnot take into my consideration acts hereafter to e, but only regard those already done, and, as have no evidence of this lady having hitherto ted any act which has terminated the annuity. respect to what has already taken place, I find nothing

nothing by which the annuity vests or is made liable to vest in any other person.

I am of opinion that this lady is entitled to have a declaration that she is entitled to the annuity, notwithstanding her marriage in 1859, and I will, with the assent of her husband, settle the whole annuity to her separate use without power of anticipation.

1863.



BONFIELD

v.

HASSELL.

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### HODGSON v. BIBBY.

Feb. 19.

THE testator, *Henry Borrowdale*, died in *Jamaica*, in 1814, having, by his will, given his real and personal estate to his father *Joseph Borrowdale* and four other persons, in trust for his father, *Joseph Borrowdale*, for life, with remainder to his mother, *Jane Borrowdale*, for life, and after her decease, in trust to pay a legacy of 500*l.* to *Elizabeth Crowdson*, and he devised and bequeathed the residue of his real and personal estate to *Ann Hodgson*. The testator appointed his father and the four other trustees his executors.

The testator's estate was realized in *Jamaica*, and a sum of 1,600*l.* was, in 1818, remitted to *Joseph Borrowdale* in *England*; but who never appeared to have invested it.

*Joseph Borrowdale*, in the same year (1818), gave a bond for securing the payment of the legacy of 500*l.* to *Crowdson* when due. The defeazance recited the fact that 1,600*l.* had been paid to *Joseph Borrowdale*, with the consent of the other executors, "for the whole of

the

*A. B.*, a trustee, misappropriated a trust fund of which he was tenant for life, and he died in 1834. *C. D.*, who then became entitled to it, died in 1858, having taken no proceeding to recover it. A bill, filed in 1863 by the representatives of *C. D.* against the representatives of the representative of *A. B.*, to recover the fund, was dismissed with costs, on the ground of the lapse of time.

1863.

Hodgeson

BIBBY.

the property of *Henry Borrowdale* in the island of *Jamaica*."

*Joseph Borrowdale* survived *Jane Borrowdale*, and he died in 1834, and in 1835 *William Hodgson*, the son of *Ann Hodgson* (the residuary legatee), who was his executor, paid the legacy of 500*l.*

*Ann Hodgson* died in 1858, having, for thirty years previously, resided with and been maintained by her son *William Hodgson*.

*William Hodgson* died in 1860, and in 1863, the Plaintiffs (who were the legal personal representatives of *Ann Hodgson*) filed this bill against the executors of *William Hodgson*, alleging "that *William Hodgson* possessed himself of the personal estate of *Joseph Borrowdale*, that he did not pay to *Ann Hodgson* the trust fund to which she was so entitled, or any part thereof, and that the same still remained wholly unpaid. In fact she was not aware of her right thereto, of which ignorance the said *William Hodgson* was aware."

The bill prayed a declaration that the estate of *William Hodgson* was (to the extent of personal estate of *Joseph Borrowdale* received by *William Hodgson*) liable to pay to the Plaintiffs, as the administrators of *Ann Hodgson*, the amount of residuary estate of *Henry Borrowdale* received by *Joseph Borrowdale*, after deducting therefrom the 500*l.* with interest from the death of *Ann Hodgson*. It also prayed an account, for payment out of the assets of *William Hodgson*, and that the estates of *William Hodgson* and *Joseph Borrowdale* might, so far as was necessary, be administered.

The Defendants, who knew little or nothing of the matter

matter, claimed the benefit of the statute, and relied on the laches of the Plaintiffs and of the person they represented.

1863.  
Hodgson  
v.  
BIBBY.

Mr. Selwyn and Mr. C. Hall, for the Plaintiff. This claim is not affected by the 3 & 4 Will. 4, c. 27, s. 40, for this is the case of a specific fund held on trust, and time is no bar to a trust; *Phillipo v. Munnings* (a). There can be no presumption of payment in this case, for the same person who was to receive the interest from William Hodgson was liable to pay him for her maintenance, and therefore one must have been annually set-off against the other; *Burrell v. The Earl of Egremont* (b). Laches cannot be objected to a person while ignorant of her rights.

Mr. W. M. James and Mr. Rowcliffe, for the Defendants. This case goes much farther than any previous one. The claim is against the representatives of William Hodgson, who was the representative of Joseph Borrowdale, who was the representative of a testator who died in 1814.

The money claimed was never a trust fund; it was assets in the hands of one of several executors who was bound to apply it, *quâ executor*, in a due course of administration, and an executor is not a trustee.

But, on the death of Joseph Borrowdale, Ann Hodgson's claim consisted of a simple demand as a debt against his assets, due in respect of an alleged breach of trust. William Hodgson, therefore, was never a trustee for her, for it is not shewn that he ever received any part of the assets of the first testator or any portion of

(a) 2 *Myl. & Cr.* 309.

(b) 7 *Bear.* 205.

#### CASES IN CHANCERY.

L He, and those representing him, are entitled to set up the Statute of Limitations claim. The Plaintiffs are also barred by the title accrued in 1834, or twenty-eight years. There is no pretence for saying that *Edgson* was not aware of her rights; the bar on that point.

π, in reply, argued that the Statute of Limitations did not apply to a debt in respect of a gift. He referred to *Ober v. Bishop* (a); *Bullock* (b), to shew that the Statute of Limitations was inapplicable.

#### IN R OF THE ROLLS.

Opinion that the case of the Plaintiffs fails, would be a very dangerous thing if the Court were in such a case.

In *Jamaica* in 1814, he leaves the whole property to his father for life, and then to his wife, and after the death of the survivor he leaves £500*l.* to one and the residue absolutely to son.

£600*l.* is remitted to the executor in *London*, with the argument on behalf of the Plaintiff that *Joseph Borrowdale*, the executor, held the money in the character of trustee, and that when he received it, the character of trustee was implied respecting it, and no time bars a trust. He had invested it in Consols and held it upon the

F. & J. 137. (b) 25 Beav. 54, and 9 H. 6.  
L. Cas. 1.

the trusts affecting it; but he did not do so and died without having invested it. I assume that he was a trustee of this fund down to his death in 1834, and that then it became a debt due from his estate. The trust fund not having been invested, it cannot be put in the same category as those cases where the specific fund is still in existence and can be traced. If it could be traced into the hands of *William Hodgson*, his executor, a very different question would be raised, and time could not be a bar to the person entitled to that trust fund. But here the only claim was against the estate of the father, to make good the trust fund which he had received and had not invested. I must assume that *Ann Hodgson* was aware of the fact, she makes no claim against *William Hodgson*, and continues to live with him for twenty-four years after the death of *Joseph Borrowdale*, without taking any step to recover the money.

If the matter had rested there, it would be impossible for the Court to assume that there were assets of *Joseph Borrowdale*, and direct an account of his estate, and charge the Defendant with the amount of that estate. But it does not rest there: *William Hodgson* survived his mother two years, and the Plaintiffs took no steps until after her death, when everybody who knew anything about the matter was dead. Nothing is more certain than this:—that the legal personal representative of a person is affected with the laches of the person whom he represents. I must therefore treat the Plaintiffs as having from 1834 to the present time, that is for twenty-eight years, taken no steps to enforce payment of their demand, and as having waited until the only person who could explain the matter was dead. The Court will, under such circumstances, make every presumption in favor of the person sought to be charged.

1863.  
HODGSON  
v.  
BIBBY.

LEADER IN THE COURT.

In this case of ~~discrepancy~~, I am of opinion that the Plaintiff is bound by the lapse of time, and I believe that Mrs. Bowyer was perfectly aware of the circumstances, and that she knew either that the assets were not sufficient, or, if they were, that she never intended to make any claim against her son.

I must dismiss the bill with costs.

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Re THE WEST SILVER BANK MINING  
COMPANY LIMITED.

THE ~~T~~HIS company was duly registered as a limited company for working mines in *Cardiganshire*, and its principal office was in *London*.

On the 12th of August, 1862, it was resolved, at a special general meeting, "that *The West Silver Bank Mining Company Limited* be wound-up voluntarily under the provisions of the Joint-Stock Companies Winding-up Acts, 1856 and 1857." A liquidator was at the same time appointed.

- ad A petition was now presented by the shareholders to wind-up the company compulsorily, and the question was, whether the winding-up ought to take place in this Court or in the Court of Bankruptcy.
- & By the 19 & 20 Vict. c. 47, s. 60, "the Court" to wind-up a limited company like the present is defined to be "the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate."

Bet

But this act was repealed by "The Companies Act, 1862," (25 & 26 Vict. c. 89,) which came into operation on the 2nd of November, 1862. By the 207th section of that act it is enacted as follows:—

"Where, previously to the commencement of this act, an order has been made for winding-up a company under any acts or act hereby repealed, or a resolution has been passed for winding-up a company voluntarily, such company shall be wound-up in the same manner and with the same incidents as if this act were not passed, and for the purposes of such winding-up, such repealed acts or act shall be deemed to remain in full force."

*Mr. Roxburgh*, in support of the petition, asked for the common winding-up order.

*Mr. F. J. Wood, contrà.* This Court has no jurisdiction, for the winding-up must be in bankruptcy. There having been a resolution to wind-up voluntarily, any compulsory winding-up must take place "in the same manner and with the same incidents as if the last act had not passed," that is, in the Court of Bankruptcy.

*Mr. Swanston* for the official liquidator.

*Mr. Roxburgh* in reply. The "manner and incidents" have reference to matters of form and procedure, and they do not affect the jurisdiction. He referred to the 81st section.

*The Master of the Rolls* held the objection to be fatal, for that if the act of 1862 be considered as not having passed, it was clear that the winding-up must be in the Court of Bankruptcy and not in Chancery. He dismissed the petition with costs.

1863.

*In re*  
THE  
WEST SILVER  
BANK MINING  
COMPANY  
(LIMITED).

1.46.3  
—

P. 21.  
 A. having a power in his will to appoint £ 300L by will and which in default of appointment was given over to B. duly appointed it to C. who died in the testator's life. He afterwards made a codicil, giving his residue, and the dividends due at his death on the £ 1,000L to his wife.  
*Hold,* that, under the Wills Act, the £ 1,000L passed to the wife under the residuary gift.

**THE** testator, *James Lomax*, bequeathed £ 300L as trust for his son *Mordecai William Lomax*, even whose death he "declared that £ 300L, part thereof, should be paid to such person or persons, at such time or times and in such manner, as his son *M. W. Lomax* should, by his last will and testament, appoint; and as to the residue thereof, and also as to the said sum of £ 1,000L, in default of or subject to such appointment as aforesaid," he gave it over to other persons.

The testator died in 1843, and the £ 300L were set apart and invested in £ 308L 3s. 6d. Consols.

**M. W. Lomax**, the testator's son, by his will dated in 1857, duly appointed the £ 1,000L to *John Pearse*; but *John Pearse*, the legatee, died in 1858.

In 1860, *M. W. Lomax* made a codicil to his will, whereby he bequeathed as follows:—"I bequeath to *Louisa* my wife all my personal estate and effects whatsoever and wheresoever, subject to the payment of my just debts, funeral and testamentary expenses, also my interest or dividends that may be due, on my decease, from the *Bank of England* on £ 1,300L sterling £ 3 per Cent. Consols, at present under the control of the Court of Chancery." He appointed an executor.

*M. W. Lomax* died in 1861, and his widow, by this petition, claimed £ 1,000L, part of £ 1,308L 3s. 6d. which was in Court, on the ground that the gift of it to *John Pearse* lapsed

lapsed by his death in the life of the testator, *M. W. Lomax*, and that it passed to her under the general residuary bequest.

1863.

 BUSH

v.

COWAN.

Mr. Lewis, for the widow, contended that the general bequest in the codicil operated as an execution of the power of appointment under the 1 Vict. c. 26, s. 27, and that there was no contrary intention appearing on the will. That the residuary gift passed not only all that which a testator attempted ineffectually to bequeath, but that also which he attempted ineffectually to appoint; *Spooner's Trust* (*a*).

Mr. Nash for the executor.

Mr. Selwyn and Mr. C. M. Roupell for the parties entitled in default of appointment. The 1,000*l.* goes as in default of appointment, for there is an intention, apparent on the will, that it shall not go to the residuary legatee. The testator gives his wife only the dividends on that sum due at his decease; this excludes the notion that he intended to give her the capital; *Moss v. Harter* (*b*).

#### *The Master of the Rolls.*

I am of opinion that the widow is entitled to the 1,000*l.* In *Moss v. Harter* (*b*) a settlor had a power to appoint a debt by instrument in writing, which, in default of appointment, was given to certain specified persons. He appointed part by deed, and afterwards made his will, and thereby gave all his personal estate "not otherwise effectually disposed of." The Vice-Chancellor observed, that the testator did not intend to deal with any property "otherwise effectually disposed of."

That

(*a*) 2 *Sim. (N. S.)* 129.

(*b*) 2 *Smale & Giff.* 458.

#### CASES IN CHANCERY.

does not apply to the present, for here codicil are but one instrument and one disposition, which takes effect on the testator's death. By it he appoints the £1,000. to be given his general residue to his wife, and everything which did not pass under

appointment. It appears indifferent whether gift is made by the same will as testator or afterwards by a codicil. I cannot accept the argument of Mr. Charles Russell, who says there was an absence of any intention to pass by the residuary clause. If that were so, it would not make the slightest difference, since says that a contrary intention

Suppose a man, having a power to B, appointed a sum of money to be laid for the benefit of a charity, which would consist of Mortmain, and gave his residue. It is clear that A. B. would take the whole sum that sum, although the testator did that it should pass to him under the will, for he clearly intended to give it to C. He thought that his intention would take in the residue only, after deducting that sum to A. B. It is a constant rule that a power includes everything that is undisposed of, gift fails at the date of the will or by sub-

It that there is, on the face of the codicil, no deal with this fund, for the testator seems either the residuary gift affected the dividends were due at his decease.

opinion that the Petitioner is beneficially entitled to the whole of the £1,000.

1863.

## HART v. ROBERTS.

Apr. 25.

**B**Y the 19th Consolidated Order, Rule 13 (a), the evidence on both sides shall be closed within eight weeks after issue joined therein, "except that any witness who has made an affidavit, intended to be used by any party to such cause at the hearing thereof, shall be subject to cross examination within one month after the expiration of such period of eight weeks."

By the 33rd Consolidated Order, Rule 10, Art. 3 (b), a Defendant may move to dismiss for want of prosecution, if the Plaintiff "does not set down the cause to be heard, and obtain and serve a *subpæna* to hear judgment within four weeks after the evidence is closed."

What occurred in the present case was this :—

The eight weeks after issue joined occurred on the 20th of *March*; affidavits had been filed, but no cross examination had taken place. The Plaintiff not having set down the cause for hearing or served a *subpæna* to hear judgment, the Defendant on the 22nd of *April* gave notice to dismiss for want of prosecution.

Mr. G. Osborne Morgan in support of the motion. "The time for closing the evidence is not at the end of the period fixed for cross examination of witnesses, but at the end of the prior period now fixed, of eight weeks from the time when issue is joined." This was expressly

(a) *Consol. Ord. 64.*

(b) *Consol. Ord. 100, and see p. 65.*

In France at the Paris Exposition many  
and indeed the most brilliant of the more modest  
is the ~~exhibition~~. It is possible that the  
French are better off than I am in the same view.  
But it will be of no use for me to discuss  
the position in the ~~exhibition~~. The one  
deserves the few lines I have. They are given  
in "Le Monde Illustré" and "Le Journal  
Suisse" and in Henry's ~~Review~~ for want of  
space. The criticism in the ~~two~~ books from  
the ~~two~~ men is the best that could have ex-  
isted. And what there might be in the ~~exhibition~~  
was ~~exhibition~~ is in ~~any~~ ~~view~~ of the  
President.

## The Letter of the Law

I agree with the rest of the Finance. I think, as  
the Vice-Chancellor Anderson said, the bulk of his  
corporate law practice. His view appears to have  
been that you cannot sue in damages while there is a  
right to sue and sue the witness.

In this case, I understand that it is not intended to cross

(a) 4 Draw. 65.

(3) 3 West Reg. 151.

cross examine the witnesses, and it is therefore clear that the evidence closed on the 20th of *March*, and the four weeks having expired, during which you are entitled to cross examine, I must make the usual order, not to dismiss, but that the Plaintiff should undertake to proceed in the usual form.

1863.

HART

v.

ROBERTS.

## WINKWORTH v. WINKWORTH.

Nov. 8.

A PETITION was presented by one of eleven children for payment out of Court of 379*l.* 19*s.* 1*d.*, her one-eleventh share of the fund in Court.

Liberty given  
to apply at  
Chambers in  
respect of the  
shares of in-  
fants amount-  
ing to 379*l.*  
each, in an  
undivided  
fund.

Mr. Higgins, for the Petitioner, in addition to the order for payment of money out of Court, asked that all future applications on behalf of the remaining children might be made to the judge in Chambers (*a*), as the parties desired to avoid the expense of a petition. He said that orders in this form had been made by Vice-Chancellor Wood.

The MASTER of the ROLLS doubted whether he had jurisdiction to make such order, but he said that as such orders had been made in another branch of the Court, he could not object to follow them.

(*a*) See 35th Consol. Order, and 15 & 16 Vict. c. 86, s. 26.

## ORDER.

"And it is ordered, that any of the parties be at liberty to apply at Chambers in respect of either the capital or income of the remaining shares of the infant Plaintiffs."—Reg. Lib. 1862, B., fol. 2103.

1562  
—

Sect. 12.  
A devise of  
real estate,  
subject and  
charged with  
legacies, does  
not create an  
express trust  
in favor of the  
legatees, and  
therefore such  
legacies are  
barred by the  
3 & 4 W. & J. 4,  
c. 27. after  
twenty years,  
unless there  
has been some  
payment or  
signed acknowl-  
edgment.

### PROUD v. PROUD (a).

THE testator *John Teasdale*, by his will dated in 1811, devised unto his nephew *Henry Proud* and his heirs part of his real estate at *Farlam*, subject nevertheless to the payment of the several annuities, legacies and bequests thereafter given and bequeathed; and after bequeathing certain other annuities and legacies, the testator charged the above part of the premises with payment of half his just debts and funeral expenses, in case his personal estate should fall short, and with the payment of one-half the mortgage money and interest then charged upon the whole of his real property.

And he gave and bequeathed unto each and every of the children of his sister *Sarah Proud* the yearly sum of 10*L* a piece, when and as they should severally attain the age of twenty-one years, to be paid until the youngest of such children as might be living should have attained the said age, and then he gave and bequeathed to each of such children the sum of 300*L* in lieu of the said annuity or yearly sum. And the testator bequeathed all his personal estate equally between *John Teasdale* and *Henry Proud*, subject to the payment of the testator's just debts and funeral expenses and the probate of his will; and in case the same should be found insufficient for that purpose, then the testator charged all his real estate whatsoever with the payment thereof, and directed his executors thereafter named to raise such sum as might be sufficient, by mortgage or otherwise

(a) *Ex relatione.*

wise of his real estate. And he appointed *Sarah Proud* and two others executrix and executors of his will.

1862.



Proud

v.

Proud.

The testator died in 1811, seised of the above real estate. His personal estate was insufficient to pay his funeral and testamentary expenses. *Sarah Proud* alone proved the will. She had four daughters, *Elizabeth, Margaret, Isabella* and *Anne*, and they were all living at the testator's death.

*Henry Proud* took possession of the estate, and his mother and four sisters continued to reside with him as part of his family, and they assisted in the management of the farm.

*Anne Proud*, the youngest daughter, attained the age of twenty-one on the 18th of *July*, 1832, and thereupon the several legacies became payable.

*Isabella Proud* continued to reside with the family until about 1833, when she went into service and only occasionally visited her mother in the intervals between her hirings ; and on the 3rd of *August*, 1841, she married *William Little*.

*Sarah Proud* died on the 28th of *October*, 1848, intestate.

*Elizabeth, Margaret* and *Anne Proud* continued, for some time, to live with their brother as before, but in *July*, 1860, they filed this bill, alleging that an arrangement had been made between them and their brother *Henry Proud*, that in consideration of their residing with and being maintained by him, they should forego not only the annuities of 10*l.* severally given to them, but also the interest of their several legacies of 300*l.*, and they asked

1862.

~~  
**Proud**  
a.  
**Proud.**

asked for the payment of their several legacies. *Henry Proud* by his answer denied the arrangement and claimed the benefit of the Statute of Limitations; but, ultimately, the Plaintiffs agreed to accept 400*l.* and the costs of the suit in satisfaction of their legacies; and on the 18th of *January*, 1862, a decree was, by consent, made for the sale of the estate; it also directed inquiries to be made whether the estate was subject to any and what incumbrances (other than the Plaintiffs' charges), and what was due and owing in respect thereof.

Under this decree, *William Little*, in right of *Isabella* his wife, claimed the benefit of the same arrangement, and carried in his claim. On the 30th of *July*, 1862, the Chief Clerk found, that the estate was charged with the legacy of 300*l.* given to *Little's* wife, and that there was an arrear of interest thereon amounting to 335*l.* 18*s.* 4*d.*

A summons was then taken out by the Defendants to vary the certificate, and it was adjourned into Court.

**Mr. M. A. Shee** for the Plaintiffs.

**Mr. Hobhouse** and **Mr. Brodrick** for the Defendant *Henry Proud*. No trust was created by the testator affecting his real estate, either for the payment of debts or legacies. The estate was certainly devised, subject to their payment; but this did not create an express trust within the 3 & 4 Will. 4, c. 27, and therefore it was barred by the 40th section as a charge or legacy; *Jacquet v. Jacquet* (a); *Francis v. Grover* (b); *Greenway v. Bromfield* (c); *Wilkinson v. Wilkinson* (d).

**Mr.**

(a) 27 Beav. 332.  
 (b) 5 Hare, 39.

(c) 9 Hare, 201.  
 (d) 9 Hare, 204.

*Mr. Rendall for Mr. and Mrs. Little.* The arrangement between the parties clearly took the case out of the 3 & 4 Will. 4, c. 27. The estate was also subject to incumbrances of the testator, and until they had been satisfied, no present right to the legacies could arise ; assuming that it did, the legatee might have to file a bill to redeem ; so long, however, as the estate was in the hands of mortgagees, the statute could not begin to run, especially in a case where the devisee took the estate subject to the legacies, and consequently to a trust which pledged the estate for payment ; *Hunt v. Bateman* (a) ; *Ravenscroft v. Frisby* (b) ; *Faulkner v. Daniel* (c).

1862.

 PROUD

v.

PROUD.

### The MASTER of the ROLLS.

The right to receive and give a discharge for the legacy arose in 1832, on the youngest daughter attaining twenty-one, that is a fact which must be admitted for the purpose of the 3 & 4 Will. 4, c. 27. It is also clear that a charge only was made upon the estate for the payment of the legacy, and that no trust was created for that purpose. This was decided by me in *Jacquet v. Jacquet* (d) and again in *Dickinson v. Teasdale* (e). What is and what is not to be considered a trust depends occasionally upon minute considerations ; but between a devise subject to debts or legacies and a mere charge, no such distinction exists. The arrangement which is said to have taken place certainly affords no ground for giving the relief asked upon the present claim ; but assuming such an arrangement to have been made, yet, after twenty years, it is most undoubtedly barred by lapse of time.

The certificate of the Chief Clerk must be varied.

- (a) 10 Ir. Eq. Rep. 360.
- (b) 1 Coll. C. C. 16.
- (c) 3 Hare, 199, 212.

- (d) 27 Beav. 332.
- (e) *Ante*, p. 511.

CASES IN CHANCERY.

WATKINS v. WESTON.

he devised his real and personal estate to trustees upon trusts which, as to three leases in Wincorth, he declared in the following

st to receive the rents and profits thereof, payment of the rent and performance of contained in the lease under which I hold d to pay the same unto and *for the sole use and benefit of my daughter Emma, now known as Wheeler.* And I do hereby declare shall not be subject or liable to the debts, or management of her present or any ad, and that her receipts alone shall be bargees to my executors for the same; but aid daughter shall depart this life before of the lease under which I hold the said n upon trust to invest such rents and public securities of Great Britain, and to e to accumulate, for the benefit of all and ld or children of my said daughter who g at her decease, the same to become em upon their attaining their respective y-one years, share and share alike."

r died in 1850; his daughter died in 1861, had any child.

olds produced 112L a year, and would not 869. They were claimed by the legal per- tatives of the daughter on the one hand, and by

by the residuary legatees on the other; and this bill was filed by one of the trustees to have the rights declared.

**Mr. Druce** for the Plaintiff.

Mr. Selwyn and Mr. Kay, for the legal personal representatives of the daughter, argued that there was an absolute unrestricted gift to the daughter in the first instance, which was afterwards cut down merely in favor of any children she might have, and this having failed, that the first unrestricted bequest to the daughter remained unimpaired. That there was an indefinite gift of the rents to the daughter, and no words which restricted the bequest to her for life. That therefore she took the leaseholds absolutely, and that they passed to her representatives; *In re Corbett's Trusts* (a); *Norman v. Kynaston* (b); *Salmon v. Salmon* (c); *Newland v. Shephard* (d); *Knight v. Selby* (e); *Jackson v. Noble* (f); *Whittell v. Dudin* (g).

Mr. Baggallay and Mr. Nalder for Joseph Kay. There was no absolute gift to the daughter, but only to the trustees, and she had a mere right to receive the rents from the trustees as long as she was capable of giving a receipt for them. Her personal enjoyment was alone contemplated, and as there was a failure of children, the leaseholds at her decease were undisposed of and fall into the residue.

**Mr. Cotton and Mr. Welford** for other parties.

*The*

- (a) *Johns.* 591.
- (b) 29 *Beav.* 96.
- (c) 29 *Beav.* 27.
- (d) 2 *Peere Wms.* 194.

- (e) 2 *Mac. & Gor.* 92; 3  
*Scott (N. S.)* 400.
- (f) 2 *Keen,* 590.
- (g) 2 *Jac. & W.* 279.

1862.  
—  
WATKINS  
v.  
WESTON.

## CASES IN CHANCERY.

### MASTER of the ROLLS.

of opinion that the daughter took an absolute interest in the leaseholds. There is an absolute gift in such instance to trustees, in trust to pay her the same, and I cannot doubt that if the will had stopped there he would have taken an absolute interest in the leaseholds, and that it would have been impossible to say that my interest in the leaseholds was left undisposed of. The testator had given her the leaseholds without the nomination of trustees : thus, if he had said, I give all my estate and interest in this property to my daughter, no one could have doubted that she would have taken the whole interest, and it is the same thing when the sole interest is vested in the trustees and the trust of the property is for her. The directions which secured the property to her for her separate use were evidently inserted for the mere purpose of excluding the marital interest of the husband. If it were held to be a gift for life, the words "for life" must necessarily be construed as referring to the life of the testator. As it stands, however, the absolute gift is to be cut down in the event of *Emma* having issue, it was a benefit intended exclusively for them. And if none, the event therefore has not happened and the property for her remains unaffected and absolute, and the property passed to her legal personal representative.

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1862.  
~~~*Re DEVONSHIRE.*

MR. *Fooks*, for Mr. *Devonshire*, the Respondent on a petition heard some time ago, moved that a copy of the petition might be filed in lieu of the original, the Petitioner having refused to file the original.

The MASTER of the ROLLS.

I find that the case of *Andrews v. Walton* (a) is precisely in point and the order may be made.

Mr. *Fooks* then asked that Mr. *Devonshire's* costs of the application might be paid by the Petitioner.

The MASTER of the ROLLS. You must have the costs.

(a) 1 *Myl. & Cr.* 360.

DECREE.

Order that a copy may be filed, and "that the Petitioner, *W. M. M.*, do pay to Mr. *Devonshire* his costs of this application and incident thereto," to be taxed, &c.—*Reg. Lib.* 1862, *A.*, fol. 2342.

1553.
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## IZOD v. IZOD.

Feb. 25, 21, 22.

Begun to trustees to apply the income or principal for the benefit of S. J., widow, and of her three children, in such proportions, &c., as the trustees, in their absolute discretion, should think proper; but in case S. J. married again, her interest to cease. The trustees declined to act. Held, that the fund must be divided equally between S. J. and her three children.

BY her will, the testatrix bequeathed as follows:—

"I hereby direct William Izod and George Izod (her executors) to invest the sum of \$1000 (subject to reduction as hereinafter mentioned) in the names of the said Henry Izod and of my son in law Charles Heaton in the purchase of government stock or funds, which I hereby give to the said Henry Izod and Charles Heaton, and the survivor of them and the executors or administrators of such survivor, upon trust to pay and apply the dividends, interest and annual income of the said Bank Annuities, and also all or any portion of the principal thereof, to or for the benefit of Mrs. Sarah Izod, the widow of my son Joseph Izod, and of his three children Thomas Izod, William Henry Izod and Elizabeth Maria Izod, in such manner, shares and proportions, at such time or times, under such conditions and for such purposes, as they the said Henry Izod and Charles Heaton, or the survivor of them, or the executors or administrators of such survivor, shall, in their or his absolute and uncontrolled discretion, think proper; but if the said Sarah Izod shall marry again, then I direct that her interest under this my will shall cease and determine. And I hereby declare, that the said Henry Izod and Charles Heaton shall not be accountable to the said Sarah Izod, or to any of the children of my said son Joseph Izod, or to any person claiming by, under or in trust for her, them or any of them, for the manner in which they shall exercise the discretionary powers hereby vested in them."

The

The testatrix died in 1856, and the trustees of the legacy declined to act. The question was, as to the relative rights of Mrs. *Izod* and her three children in the fund.

1863.

*Izod  
v.  
Izod:*

Mr. *Hobhouse* and Mr. *T. A. Roberts*, for the Plaintiff Mrs. *Sarah Izod*, argued that as the trustees had refused to exercise their discretion, the fund was divisible between Mrs. *Izod* and her three children; *Crockett v. Crockett (a); Penny v. Turner (b)*.

Mr. *Lloyd* and Mr. *Prendergast*, for the Defendants, argued that as Mrs. *Izod's* interest was to cease on her second marriage, it was impossible to hold that she took an absolute interest in the corpus; and that, therefore, she had only a life interest.

[*The MASTER of the ROLLS* referred to *Brown v. Higgs (c.)*.]

Mr. *Hobhouse* in reply.

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### *The MASTER of the ROLLS.*

I think the fund is divisible in fourths. I hesitated at first on account of the direction that if *Sarah Izod* married again her interest was to cease and determine; but I think this was a discretionary power to appoint the income or principal between four persons "in such manner, shares and proportions" as the trustees should in their discretion think proper. Under this, they might have given her any portion of the capital they thought fit,

Feb. 23.

and

(a) 2 *Phill.* 553.  
(b) 2 *Phill.* 493.

(c) 4 *Ves.* 708; 5 *Ves.* 498,  
and 8 *Ves.* 561.

#### CASES IN CHANCERY.

I must hold that *Brown v. Higgs* applies, here this Court has to administer a fund, the sum of which is intrusted to the discretion of one man to exercise it, the only distribution the Court can make is to divide it, equally, (a) between the objects of the testator's bounty, it being impossible to divide it in any other manner as the donee of the power should think fit.

make a declaration to that effect.

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*v. Turner*, 2 P. & L. 3 H. of L. Cas. 223; *Re White's Trust*, John. 636.  
*v. Bruges*, 2 P. & L.  
*rgent v. Froundergate*,

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#### TYRWHITT v. TYRWHITT.

question in this case was, whether a sum of 10,000*L.* charged on fee simple estates of Sir Jones had become merged, in consequence of Sir Jones having become the absolute owner of them. It arose under the following circum-

*Harriet Emma Jones* married Mr. Mytton, entitled to a portion of 10,000*L.*, part of which was settled on her marriage by a deed dated the 20th of August, 1818. By this deed, the sum of 9,200*L.* (part 100*L.*) was assigned to her brother Sir Tyrwhitt, and John Arthur Lloyd, upon trust for *Harriet Emma*.

It is only consistent with the charge being kept on foot, the interest of the owner that the charge should not merge.

intention, on the part of the owner of the inheritance, of merger of a charge thereon, made previous to his becoming entitled to it.

A trust for A. for life, with remainder to B. absolutely, was created (C.) to B., on mortgage of his fee simple estates. By the will it was declared that they would hold the fund, after the decease of the testator, administrators and assigns, for his and their absolute benefit. Held, that this was not a sufficient indication of an intention to merge the charge in the inheritance.

CASES IN CHANCERY.

*Emma Jones* for life, with remainder to Mr. *Mytton* for life, and after the death of the survivor, as to 5,000*l.* (part of it) on certain trusts for the children of the marriage; and as to the residue (4,200*l.*), in case *Harriet Emma Jones* should predecease Mr. *Mytton* (which happened), upon such trusts as she should by deed or will appoint.

18

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Tyr

Tyr

There was issue of the marriage one child only, viz., *Harriet Emma Charlotte Mytton*.

Mrs. *Mytton* by her will appointed the 4,200*l.* to her brother Sir *Tyrwhitt Jones* absolutely, and she died in July, 1820.

In 1827, the 9,200*l.* was realised and lent to Sir *Tyrwhitt Jones* upon a mortgage of his fee simple estate at *Atcham* in the county of *Salop*. Accordingly, by an indenture dated the 2nd of *August*, 1827, and made between Sir *Tyrwhitt Jones* of the first part, Mr. *Mytton* of the second part, and *J. A. Lloyd* and Sir *Tyrwhitt Jones* (as trustees) of the third part, Sir *Tyrwhitt Jones* conveyed the estate at *Atcham* in the county of *Salop* to *J. A. Lloyd* and his heirs, subject to redemption on payment by Sir *Tyrwhitt Jones* to *J. A. Lloyd* and Sir *Tyrwhitt Jones* of the sum of 9,200*l.* and interest, and Sir *Tyrwhitt Jones* covenanted to pay that sum. By this deed, it was declared, that this sum should be held upon the trusts of the settlement of 1818. The deed then recited, that there being only one child of the marriage, doubts had arisen whether she was entitled to the 5,000*l.*, but that Sir *Tyrwhitt Jones* was desirous that such doubts should be obviated and *H. E. C. Mytton* should take the 5,000*l.*, and that, for effectuating such purpose, Sir *Tyrwhitt Jones* and, at his request, *J. A. Lloyd* had agreed to make the declaration hereinafter mentioned.

It

'ASES IN CHANCERY.

I that *J. A. Lloyd*, at the request of us, and also Sir *Tyrwhitt Jones*, and I thereby agree and declare, that they, Sir *Tyrwhitt Jones*, their executors, assigns, would stand possessed of the subject to the life interest therein upon and for the trusts, intents and g, that is to say, as to the sum of £ upon certain trusts for the benefit of ; "and as to the sum of 4,200*L* (the sum of 9,200*L* thereby secured, after on the said sum of 5,000*L*), immediately e decease of *John Mytton*, and as to same sum of 9,200*L* in case *H. E. C.* ie under the age of twenty-one years ing been married, and the interest, exceeds thereof respectively, in trust for s, his executors, administrators and d their absolute benefit."

*Jones* made his will in 1826, but is a lunatic and so continued until his

edecesased him and died in 1834.

I of Sir *Tyrwhitt Jones*, the Plaintiff, absolutely entitled to his personal estate, ant for life of his real estates, subject the will) as to those in the county of charges to which they were then at with remainder to the Defendant Sir iit for life, with remainder to the De': *Tyrwhitt* his infant son in tail.

ill remained charged upon the estate, and

and the question raised by this suit was, whether 4,200*l.*, the part of it which belonged absolutely to Sir *Tyrwhitt Jones*, had sunk into the inheritance or still formed part of his personal estate. By this bill, it was claimed by his widow absolutely, as part of the personal estate bequeathed to her.

Mr. *Kenyon* and Mr. *Rodwell* for the Plaintiff. The merger of the charge in the ownership in fee is a matter of intention, but if no intention is either expressed or to be implied, it depends on which is most for the benefit of the owner of the estate; *Wigsell v. Wigsell* (*a*); *Forbes v. Moffatt* (*b*). Here there is an expression of intention contained in the deed of 1827, whereby Mr. *Lloyd*, "at the request of Sir *Tyrwhitt Jones*," declares that he will hold the 4,200*l.* "in trust for Sir *Tyrwhitt Jones*, his executors, administrators and assigns, for his and their own absolute benefit." The burden of proof "is therefore shifted, in consequence of this presumption of an intention to keep the charge on foot;" *Gunter v. Gunter* (*c*). Again, the devise of the *Shropshire* estate, "subject to the charges to which it was then at present liable," is another indication of intention to keep the charge on foot; *Swinfen v. Swinfen* (*d*); *Grice v. Shaw* (*e*). The lunacy in 1830 put an end to all further or contrary indication of intention.

Mr. *Selwyn* and Mr. *Karslake* for Sir *H. T. Tyrwhitt* and *H. T. Tyrwhitt*. The same person having become the absolute owner of the estate and of the charge, the charge *prima facie* merged in the inheritance. Here no expression of intention could avail during the life of Mr. *Mytton*, for until his death, Sir *Tyrwhitt Jones* never

(*a*) 2 *Sim. & S.* 364.  
 (*b*) 18 *Ves.* 384.  
 (*c*) 23 *Beav.* 573.

(*d*) 29 *Beav.* 199.  
 (*e*) 10 *Hare*, 76.

1863.  
 — —  
 TYRWHITT  
 v.  
 TYRWHITT.

#### CASES IN CHANCERY.

ver became absolute owner of the charge. The deed 1827 and the will only expressed the existing trusts which the charge was held, and this made no mention in them, or expressed any intention as to pining it on foot after the decease of the tenant for ; it was executed with other objects. There being expression of a different intention, and there being reason for saying that it was for the interest of *Tyrwhitt Jones* to keep the charge on foot, it must be held to have merged in the inheritance; *Astley v. Illes* (a); *Tyler v. Lake* (b); *Pitt v. Pitt* (c); *Hood Phillips* (d); *Swabey v. Swabey* (e).

Mr. Tudor for *J. A. Lloyd*.

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#### The MASTER of the ROLLS.

The question is, whether, on the death of Mr. Mytton, tenant for life of this fund, the 4,200*l.* merged in fee simple of the estate at Atcham in the county of *Shropshire*, which was vested in Sir *Tyrwhitt Jones*, or either the reservation in the mortgage deed of 1827 this fund, "in trust for Sir *Tyrwhitt Jones*, his executors, administrators and assigns, for his and their absolute benefit," kept it severed from the freehold and de it part of his personal estate.

Mr. Mytton died in March, 1834; Sir *Tyrwhitt Jones* survived him about five and a half years; but as he had, 1830, in consequence of an accident, become incapable managing himself and his affairs, no expression of intention by him relative to this matter is to be found on

the

- (a) 1 *Sim.* 298, 337, 338.  
(b) 4 *Sim.* 351.  
(c) 22 *Brow.* 294.

- (d) 3 *Brow.* 513.  
(e) 15 *Sim.* 106.

the death of Mr. *Mytton*, or indeed at any other time, except what is to be gathered from the trusts of the mortgage deed of 1827.

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TYRWHITT  
v.  
TYRWHITT.

The rule is this :—*Prima facie* the charge merges in the inheritance, but the presumption may be rebutted if it be shewn that the intention of the owner of the charge was that it should not merge. Three tests are usually applied, for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance, at the time when he became entitled to the absolute interest of the charge. First, any actual expression of that intention; secondly, where the form and character of the acts done are only consistent with the keeping the charge on foot; and thirdly, such an intention may be presumed, when, though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance. This last point does not assist the case of the Plaintiff, on the present occasion. Sir *Tyrwhitt Jones* was owner in fee simple of the land on which the 4,200*l.* was charged, and in such cases, it is the presumption of law, which is also in accordance with the ordinary custom of the world, that it is for the interest of the owner of the estate that the charge should not be kept on foot.

If, therefore, the presumption of merger is to be rebutted in the present case, it must be by reason of the intention of Sir *Tyrwhitt Jones*, expressed or to be implied from the form of the transaction. Except from the form of the deed of *August*, 1827 and the declaration therein contained, no such intention can be gathered from any words or acts of Sir *Tyrwhitt Jones*. The question is therefore confined to the construction and fair inference to be drawn from that deed.

After

#### CASES IN CHANCERY.

fully considering this case, I am of opinion  
that evidence of such intention, on the part  
*Tyrwhitt Jones*, is to be gathered from that deed.  
place, the declaration that the 4,200*l.* should,  
after the death of Mr. *Mytton*, be "in  
*Tyrwhitt Jones*, his executors, adminis-  
assigns, for his and their absolute benefit,"  
the statement of the trust which already  
fund, and cannot properly be taken to be  
of his intention that the fund should not  
observation pressed upon me, that, if Sir  
*Jones* had intended that the charge should  
ould so have expressed it in the deed, does  
h my assent. It might well have happened  
*Tyrwhitt Jones* might have predeceased Mr.  
which case, the charge must necessarily have  
n foot, and the expression of an intention,  
00*l.* should merge, could only have been  
plied to the case of Sir *Tyrwhitt Jones*  
& *Mytton*, and not to his dying before him,  
, in the event of intestacy, the land would  
ave gone to his heir and the charge to  
ersonal representatives and next of kin.  
opting or expressing any opinion, as to  
s previously expressed intention of Sir  
*Jones* would be sufficient to create a present  
I apprehend to be clear:—that no previous  
of such intention would have any effect,  
*Tyrwhitt Jones* lived to the time when such  
became united; in any other event, the  
which Sir *Tyrwhitt Jones* could operate  
d would have been, by direct dealing with  
ither by deed or will.

*Tyrwhitt Jones* had thought fit specifically to  
his property by will, either in favor of his  
heir

heir or any other relation, he might have done so, and in such case, the question would never have arisen, and I entertain considerable doubts whether any expression of intention of Sir *Tyrwhitt Jones*, previously to the time of the union of the interests, could settle the matter, as it is clear that he could alter his intention at any time up to the time of merger.

1863.

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Tyrwhitt  
" " Tyrwhitt.

But what principally influences my judgment is, that I do not find here, any expression of intention that the charge shall not merge, but that it shall remain in force. It must be the expression of the owner of the charge; but is there any such expression here? it is no more the expression of intention of Sir *Tyrwhitt Jones* than it is of the intention of Mr. *Lloyd*. They were both trustees, and they both, in the character of trustees, declare the trusts of the fund; but, except as trustees, they declare nothing. In order to have satisfied the contention of the Plaintiff, assuming that the declaration of intention may anticipate the period when the charge falls in (on which point I have already stated I express no positive opinion), there ought to have been the expression of the intention of Sir *Tyrwhitt Jones* alone, in his character of *cestui que trust*, and not one made jointly with Mr. *Lloyd*, in his character of trustee. It is, in truth, nothing more than a statement of the trusts affecting the fund, and that by the two trustees in whom the fund was vested.

If Sir *Tyrwhitt Jones* had so intended, he might have expressed his wish, that the fund, on the death of Mr. *Mytton*, should go to his legal personal representative, on the one hand, or merge in his estate in the other, and then make the trusts accordingly follow that intention. But in the absence of any such recital, or any such intention appearing by the deed other than by the

CASES IN CHANCERY.

IZOD v. IZOD.

BY her will, the testatrix bequeathed as follows:—

"I hereby direct *William Izod* and *George Izod* (her executors) to invest the sum of 600*l.* (subject to reduction as hereinafter mentioned) in the names of the said *Henry Izod* and of my son in law *Charles Heaton* the purchase of government stock or funds, which I hereby give to the said *Henry Izod* and *Charles Heaton*, and the survivor of them and the executors or administrators of such survivor, upon trust to pay and apply the dividends, interest and annual income of the said bank Annuities, and also all or any portion of the principal thereof, to or for the benefit of Mrs. *Sarah Izod*, the widow of my son *Joseph Izod*, and of his three children *Thomas Izod*, *William Henry Izod* and *Elizabeth Maria Izod*, in such manner, shares and proportions, at such time or times, under such conditions and for such purposes, as they the said *Henry Izod* and *Charles Heaton*, or the survivor of them, or the executors or administrators of such survivor, shall, their or his absolute and uncontrolled discretion, think proper; but if the said *Sarah Izod* shall marry again, then I direct that her interest under this my will shall cease and determine. And I hereby declare, that the said *Henry Izod* and *Charles Heaton* shall not be accountable to the said *Sarah Izod*, or to any of the children of my said son *Joseph Izod*, or to any person aiming by, under or in trust for her, them or any of them, for the manner in which they shall exercise the discretionary powers hereby vested in them."

The

The testatrix died in 1856, and the trustees of the legacy declined to act. The question was, as to the relative rights of Mrs. *Izod* and her three children in the fund.

1863.

*Izod*

v,

*Izod:*

Mr. *Hobhouse* and Mr. *T. A. Roberts*, for the Plaintiff Mrs. *Sarah Izod*, argued that as the trustees had refused to exercise their discretion, the fund was divisible between Mrs. *Izod* and her three children; *Crockett v. Crockett (a)*; *Penny v. Turner (b)*.

Mr. *Lloyd* and Mr. *Prendergast*, for the Defendants, argued that as Mrs. *Izod's* interest was to cease on her second marriage, it was impossible to hold that she took an absolute interest in the corpus; and that, therefore, she had only a life interest.

[*The MASTER of the ROLLS* referred to *Brown v. Higgs (c.)*.]

Mr. *Hobhouse* in reply.

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### *The MASTER of the ROLLS.*

I think the fund is divisible in fourths. I hesitated at first on account of the direction that if *Sarah Izod* married again her interest was to cease and determine; but I think this was a discretionary power to appoint the income or principal between four persons "in such manner, shares and proportions" as the trustees should in their discretion think proper. Under this, they might have given her any portion of the capital they thought fit,

Feb. 23.

and

(a) 2 *Phill.* 553.  
(b) 2 *Phill.* 493.

(c) 4 *Ves.* 708; 5 *Ves.* 498,  
and 8 *Ves.* 561.

1863.

*Re*  
**KENNETH**  
**MACKENZIE's**  
**SETTLEMENT.**

redemption or paying off the aforesaid Bank Annuities or any of them, or by means of any tax or duty to be imposed thereon, or from any other cause whatsoever, the dividends or annual proceeds of the aforesaid Bank Annuities shall not be sufficient to pay and satisfy all the said annuities or yearly sums of money hereinbefore directed to be paid, then such said several annuities or yearly sums of money *shall abate and be diminished rateably* and in proportion to the amount of such deficiency."

The settlement provided, that if *Mary* or *Louisa* left children, they were respectively to have the capital producing their mothers' annuities, which, in default of children, was to "sink into and again become and form part of the" 20,000*l.* Consols and 16,000*l.* £5 per Cents. In the same way, *Elizabeth's* children were to have a provision. And the children of the three children of *Charles* and the children of *Frederick* were to have the principal producing their parents' annuities, which, in default, was to sink into the two funds.

The settlement then contained the following gift over:—

It was thereby declared, "that (subject and without prejudice to the several trusts and directions therein-before declared and contained of and concerning the sums of Bank Annuities, and the dividends and annual proceeds thereof, and to the raising and payment of the said several annuities or yearly sums, whilst they or any of them should be subsisting,) the trustees should stand possessed of the 20,000*l.* Consols and 16,000*l.* £5 per Cents., or so much and such part or parts, respectively, as should not be otherwise disposed of, pursuant to the trusts or directions aforesaid, and in the dividends or annual proceeds, or *surplus* dividends or annual proceeds thereof, respectively, in trust for and for the benefit of

*Charles*

*Charles Mackenzie and Frederick Mackenzie* for life,  
with remainder to their respective children."

1863.

Re  
KENNETH  
MACKENZIE'S  
SETTLEMENT.

The events which happened were as follows:—The testator died in 1822, having survived his wife. In 1822 the £5 per Cents. were reduced to £4 per Cents. In 1829 *Frederick* died without issue. In 1840 the £4 per Cents. were reduced to £3 : 10s. per Cents. *Mary* died in 1831, leaving a son, who received his share of the capital. In 1844 the £3 : 10s. per Cents. were reduced to £3 : 5s. per Cents., and in 1854 they were further reduced to £3 per Cents.

Down to 1862, the income had thus become insufficient to pay the annuities in full, and they had been diminished rateably. In *July*, 1862, *Louisa* died, and the income then became sufficient to pay the existing annuities.

The fund having been paid into Court, the question was, whether the existing annuitants were entitled to be paid their annuities in full.

Mr. *Selwyn* and Mr. *C. Roupell*, for the Petitioner, cited *Farmer v. Mills* (*a*) ; *Scott v. Salmond* (*b*).

Mr. *Baggallay* and Mr. *Freeling*, for an annuitant, did not claim the arrears of annuity, but merely the full amount for the future.

Mr. *Haddan*, Mr. *Waller*, Mr. *Wright*, Mr. *L. Mackeson* and Mr. *Rowcliffe*, for other Respondents, cited *Earle v. Bellingham* (*c*) ; *Mills v. Drewitt* (*d*).

Mr. *Selwyn*, in reply.

*The*

(*a*) 4 Russ. 86.

(*b*) 1 Myl. & K. 363.

(*c*) 24 Beav. 447.

(*d*) 20 Beav. 638.

1863.

*Re*  
**KENNETH  
 MACKENZIE's  
 SETTLEMENT.**

*The MASTER of the ROLLS.*

The question raised upon this settlement is not whether, in consequence of the reduction of the £5 per Cents. into New £3 per Cents. the annuities which originally exhausted the whole income are to abate in proportion, but whether, in consequence of some of the annuitants having died without children, the existing annuitants are afterwards to be again increased, the income being now sufficient to pay them in full. This question depends solely on the construction to be placed on the settlement.

I am of opinion that the cases which have been referred to, which are undoubtedly good law, have no reference to the circumstances of this case, under the peculiar frame and words of the settlement. It is quite true, that where a fund is set apart to answer an annuity, and the capital is given over after the death of the annuitant, if the income become diminished, the annuitant cannot resort to the capital to make up the deficiency, nor can he resort to another fund set apart to provide for another and distinct annuity. But I think that this is not the construction of this settlement. Here the testator intended to provide one common fund, out of the income of which certain annuities were to be paid, and he provided that if, by any means, the dividends should not be sufficient to satisfy all the annuities, then that they should abate and be diminished, rateably and in proportion to the amount of such deficiency. Without that, and if there had been no gift over, it is most probable that the capital would have been liable to make good the deficiency of the annuities. Then there is a proviso giving to the children of annuitants the proportionate capital producing their annuities. The effect of which is clearly, that if the annuities should become diminished

diminished by reason of the conversion of the funds, the children of an annuitant, on his death during that period, could only take the capital corresponding to the abated annuity. But if such annuitant had no children, the part of capital intended for them was to sink into and again become and form part of the 20,000*l.* £3 per Cent. Consolidated Bank Annuities, and 16,000*l.* Navy £5 per Cent. Bank Annuities, or one of them, and was to be applied and disposed of accordingly, that is, in the payment of the several annuities mentioned ; and the payment over of the residue does not take place until after that has been in full operation : that means, shall be applied and disposed of as mentioned in this settlement. These words, together with the particular manner in which the residue is given over, in my opinion, govern the construction of this settlement.

Some of the annuities have ceased, but I think that it is inconsistent with what I have previously read, that any arrears should now be paid, not only is there no direction to that effect, but, in truth, there are no arrears, for the annuities abated when the income abated ; but there is a direction that the whole of the subsisting annuities shall be paid while the fund is sufficient for that purpose. The fund is sufficient, and the abatement consequent on the diminution of the fund has ceased. That is the only way in which, in my opinion, I can read this settlement.

I am further confirmed in that view by the gift over of the residue, which is only to take effect, subject to the trusts before declared, and without prejudice to the raising and payment of the said several annuities or yearly sums whilst they or any of them should be subsisting. It would, in my opinion, be a straining of the words of this settlement, to say, that because an an-

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—  
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nuitant had been compelled to abate and to receive 250*l.* a year instead of 300*l.* a year, by reason of the reduction in the funds, and when the income afterwards recovered by the death of an annuitant without children, and became sufficient to pay the annuities in full, that the gift over could take effect while any of those annuities remained unpaid. The gift over is only after payment of all the annuities or of those which should be subsisting, and there is one mixed fund created for this purpose.

Then the trustees are to hold this mixed fund, or so much and such part or parts respectively as should not be otherwise disposed of, pursuant to the trusts or directions aforesaid, and the dividends or annual proceeds or *surplus* dividends or annual proceeds thereof, respectively, in trust for the residuary legatees. It is only the surplus dividends that is to go over. Surplus after what? After payment of all the annuities in full.

The result is, that there was a large fluctuating fund, which, when the testator died, was sufficient to pay the annuities in full, but it afterwards ceased to be sufficient for that purpose, and it afterwards recovered and became sufficient to pay them in full. I am of opinion that the existing annuitants are now entitled to receive those annuities in full. I look at the case in the same way as if, after the reduction of the £5 per Cent. Bank Annuities by act of parliament, they had been restored to £5 per Cent. Annuities. The annuities would then have revived in full. I am therefore of opinion that no residue is given over until these annuities have been fully paid, and I will make a declaration to that effect.

1863.

## DOBSON v. BANKS.

Feb. 23.

**A**S to all his real and personal estate, the testator gave the same to the Defendant *Henry Banks* and *Alfred Emmins*, upon trust, except as to any money due to him from the said *Alfred Emmins*, to convert the same, by sale or disposal, in such manner as they might deem fit, into money, and invest the net produce thereof in the parliamentary stocks or funds of *Great Britain* in their joint names, and pay the interest thereof unto his wife *Mary Ann Rebbeck* for her life, and upon her decease, to divide the principal or capital sum unto his daughter in law, his three daughters, and his son.

The testator gave all his real and personal estate to trustees, upon trust, except as to money due to him from *A. E.*, to convert by sale and invest in the funds, "and pay the interest thereof unto his wife" for life, with remainder over:—

*Held*, that the widow was entitled to the interest arising from the debt from *A. E.*

The testator died in 1851.

At the death of the testator, there was due to him from *Alfred Emmins* the principal sum of 290*l.* (which had been advanced by the testator upon a mortgage of certain leasehold property of *Alfred Emmins*), together with a considerable arrear of interest.

The widow contended, that, according to the true construction of the testator's will, the money due to him from *Alfred Emmins* was excepted only from the trusts for conversion and investment, and not from the beneficial trusts declared of his residuary estate. The Plaintiffs on the contrary insisted that it was undisposed of and belonged to the next of kin.

Mr. Ward for the Plaintiffs.

s 2

Mr.

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Mr. F. Sims Williams for the Defendants.

## The MASTER of the ROLLS.

I am of opinion, that the Plaintiffs' case fails, and that the construction put upon this will by Mr. Williams is the correct one. The question is, whether the Plaintiffs are entitled, as next of kin, to the debt which was due from *Emmins* to the testator at his death. The Plaintiffs contend that it is not disposed of by the will, but I am of opinion that it is.

The Court always leans against an intestacy, and here I think the expressions used by the testator amount to a gift of all his property. He gives "all his real and personal estate to his executors." This is plainly a gift of the whole, and that which follows is a declaration of the trusts on which it is to be held, namely, to pay the interest to his wife for life ; but there is also a trust for the conversion of the whole of the property other than *Emmins'* debt.

I think, from the whole scope and purpose of the will, the testator did not intend the debt to be given beneficially to the executors, and it is not claimed by them ; and I am of opinion that the trust for the investment does not relate to the debt, which they cannot call in but must leave as it was bearing interest ; but that the trust in favor of the widow affects the whole estate. I will make a declaration to that effect.

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1863.

## LOCKE v. PRESCOTT.

Feb. 24, 26.

**I**N 1859, the Plaintiff Captain *Locke* applied to Messrs. *Bowes & Bellingham*, auctioneers, to lend him 300*l.*, on the security of 1,200*l.* Preference £6 per Cent. Stock in the *Waterford and Kilkenny Railway Company*. This they agreed to do, but they obtained the money from their bankers, the *Bank of London*, on the security of the stock. The Plaintiff thereupon executed a legal transfer to *Marshall and Boore*, two of the officers of the Bank, and the certificates were delivered to them.

In November, 1859, Messrs. *Bowes & Bellingham* transferred their banking account to Messrs. *Prescott & Co.*, who, at their request, thereupon advanced the 300*l.* necessary for redeeming the stock. They paid the amount to the *Bank of London*, and, upon a written authority of the Plaintiff, *Marshall and Boore* executed a transfer of the preference stock *in blank*, that is, as regarded the date and the name of the transferee; the certificates and transfers were handed over by Messrs. *Bowes & Bellingham* to Messrs. *Prescott*, their bankers, as a security for their advance. At this time, Messrs. *Prescott* clearly had no notice of the Plaintiff having any interest in the stock; but subsequently, on the 31st of May, 1860, the following letter was written by Messrs. *Bowes & Bellingham* to Messrs. *Prescott*:

"We observe that Saturday next, the 2nd proximo, is the day upon which the term of the loan upon the *Waterford and Kilkenny £6 per Cent. Preference Stock* expires. We have been requested by our principal to extend the term to the 2nd day of September ensuing,  
which

Bankers advanced to customers 300*l.* to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated, that they had been requested by their "principal" to extend the term of the loan on the stock. The stock actually belonged to a third party, *A. B.*:— Held, that, after the receipt of this letter, the bankers had constructive notice of *A. B.*'s right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock.

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Locke

v.

Prescott.

which we have consented to do. We beg, therefore, if convenient, you will oblige us in a similar manner."

In *July*, 1860, the partnership between *Bowes & Bellingham* was dissolved, and in the following year *Bowes* left *England* in difficulties, and *Bellingham* became bankrupt. There being a balance beyond the 300*l.* due from Messrs. *Bowes & Bellingham* to Messrs. *Prescott*, on their general banking account, Messrs. *Prescott* sold the railway stock, and insisted on retaining the produce in repayment, not only of the 300*l.*, but also of their general balance.

By this bill, the Plaintiff insisted, that Messrs. *Prescott*, at the time of the delivery of the blank transfer, had notice of the Plaintiff's title, which, however, they distinctly denied. The Plaintiff also charged, that the transfers in blank, executed by *Marshall, Boore* and the Plaintiff, were void, and that neither Messrs. *Prescott* nor the purchaser from them ever acquired any interest whatever, either legal or equitable, in the preference stock under the transfers; and that if such transfers were not absolutely void, and any interest passed to Messrs. *Prescott*, then that they accepted the transfers by way of mortgage only, and with full notice of the Plaintiff's interest in the stock as the mortgagor thereof.

The bill prayed a declaration, that the transfers in blank and the sale of the stock were null and void; that Messrs. *Prescott* might account for the moneys received, and that, after retaining the 300*l.* and interest, they might pay the balance of the moneys received by them to the Plaintiff.

Mr. *Baggallay* and Mr. *Ward*, for the Plaintiff,  
argued

argued that the transfer in blank was void. *Tayler v. The Great Indian, &c., Company* (a); *Hibblewhite v. M'Morine* (b); and see *Swan v. The North British Australasian Company* (c). And, secondly, that Messrs. *Prescott* took with notice of the Plaintiff's rights, and could only claim to the extent of the mortgage which he had authorized and made.

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Locke
v.
Prescott.

Mr. Southgate and *Mr. Wolstenholme*, for the Defendants Messrs. *Prescott*, contended that the transfer in blank was in accordance with the usual course of dealing with bankers and others, and that the Plaintiff, who executed it, was estopped from contending that it was invalid. They pressed strongly on the Court the alarming result of questioning a custom of dealing amongst mercantile men and bankers, which was universally prevalent in the city, and that to almost an unlimited extent. That if the transfer were really void, still the stock would remain vested in *Marshall* and *Boore* as trustees for Messrs. *Prescott*. Secondly, they argued that Messrs. *Prescott* dealt only with their customers, and had no notice of the Plaintiff's title, and therefore that, by contract and the usual course of dealing, they had a charge for their general balance.

The MASTER of the ROLLS.

Nothing that I may say in this case will, in the slightest degree, affect the power of bankers, in the city of *London*, safely to advance money upon the security of stock or shares deposited with them by any one, where the banker has not notice or reasonable cause to believe

(a) 4 *De G. & J.* 559.

(c) 32 *L. J. (Exch.)* 273.

(b) 6 *Bleec. & Wels.* 200.

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PREScott.

believe that the stock or shares belong to another, or that that other person has merely pledged them to him who proposes to pledge them with the bank.

But the power so expressed does not exonerate Messrs. *Prescott & Co.* from liability in this case. And upon the evidence, I am of opinion that they are not entitled to any claim upon the preference stock beyond the amount advanced by them upon the transfer of the securities.

The facts of the case are not material so far as relate to the advances by the *Bank of London*, who it appears advanced 300*l.* upon the security of 1,200*l.* preference stock, and this security was transferred to Messrs. *Prescott & Co.*, when they, at the request of Messrs. *Bowes & Bellingham*, advanced 300*l.* for the purpose of paying off the *Bank of London*. I see no trace of Messrs. *Prescott* having had, at that time, any evidence or notice given to them, so as to make them think that this stock belonged to the Plaintiff or that he was interested therein. If the matter had rested there, I should have held them entitled, as against Messrs. *Bowes & Bellingham*, to hold the stock as a security for the amount of the balance due to them (a).

But the difficulty I have, which I think is insuperable, is this:—as soon as they received distinct notice that the stock belonged to another person, and in my opinion it is immaterial when that was done, the stock can then only be a security for the balance due to them at that period. They had no right, after they had received notice of that fact, to advance any further money to *Bowes & Bellingham*

(a) *Branda v. Barnett*, 12 Cl. & Fin. 787.

& *Bellingham* on the security of that stock, which they knew belonged to another person, or to hold it as a security for the general balance due to them from Messrs. *Bowes & Bellingham*. The stock will always be a security for the amount first advanced upon it, and there will be a specific lien for that sum, but beyond that, I am of opinion they are not entitled.

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I find that on the 30th of *May*, 1860, Messrs. *Bowes & Bellingham* wrote Messrs. *Prescott, Grote & Co.* this letter—[see *ante*, p. 261].

Here, therefore, is a distinct notice that there was a “*principal*” who had advanced that stock to or deposited it with Messrs. *Bowes & Bellingham*, and it is not ambiguous, for it refers to “the loan upon the *Waterford* and *Kilkenny £6 per Cent. Preference Stock*,” which was the 300*l.* advanced upon the 1,200*l.* stock, and they say “we have been requested by our “*principal* to extend the term,” pointing out therefore that there was a principal who had advanced that stock to *Bowes & Bellingham*.

My opinion is, that, after that period, Messrs. *Prescott* were not entitled to consider that stock as a security for anything more than the 300*l.* advanced upon it, and that they could not, after that notice, hold it as a security for any floating balance.

It appears, that, at this time, nothing was due beyond that amount; though, at a subsequent period, about 200*l.* was due to them from *Bowes & Bellingham* on the balance of their account, and they have taken the whole of this stock as a security for that balance. This, in my opinion, they were not entitled to do.

The

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WYLD.

says that the Court shall have jurisdiction to give damages in cases of this description. Formerly, the Court used to make the decree without prejudice to any action which might be brought at law. This was a very inconvenient course to adopt, but now the Court deals with the whole matter. I concur with Vice-Chancellor *Stuart*, that the words of the Act do not require that damages should be specifically prayed. The bill prays for such further or other relief as the nature of the case shall require. This includes the relief which, under the altered circumstances, the Plaintiff is entitled to, and which spring out of what he was entitled to when the bill was filed. It may be, that in ascertaining the amount of damages the evidence now excluded may be used in mitigation of damages.

I must make a decree to ascertain what damages the Plaintiff has sustained by reason of the Defendant having pulled down the wall of No. 10, *Charing Cross*, and the Plaintiff must have his costs of suit up to this time. Reserve further consideration and subsequent costs.

1863.

MOSSE v. SALT (a).

Nov. 6, 10.

THE Defendants, Messrs. *Salt & Co.*, were the Plaintiff's bankers, and he, being indebted to them on an account stated, executed a mortgage to them of some property, which was dated the 5th of November, 1846, for securing the payment, at the end of six months, of the sum of 2,678*l.* 8*s.* 1*d.* and interest at 5*l.* per cent. In 1853, Messrs. *Salt* obtained a transfer to them of a prior mortgage for 1,600*l.*

Messrs. *Salt* made a further advance of 1,059*l.* to the Plaintiff, and in *March*, 1853, obtained an additional security. They continued to act as bankers for the Plaintiff and received moneys on their securities. The bill stated, that they sent to the Plaintiff accounts, sometimes yearly and sometimes for shorter periods. These accounts treated the mortgage debts as sums due to the bankers on overdrawn accounts, and after setting off the annual income and other moneys received by them against the mortgage debts and disbursements on the other side, they charged interest on the balance and added that interest to the principal in the succeeding account. It also alleged, that the Defendants never allowed income tax on their charge for interest on their debt, though it had been deducted from the several sources of income. That the income of the property mortgaged

(a) *Ex relatione.*

Held, that in ascertaining the amount due between them, the accounts must, in the first instance, be taken separately and on different principles.

Though in dealings between merchants, in discounting bills and the like, and in loans made for short periods, the income tax is not deducted, yet, in a mortgage transaction, the mortgagor is entitled to deduct it.

When the accounts between banker and customer have been carried on for a series of years on a particular principle, the Court will assume there is an agreement to that effect; but acquiescence in it does not amount to a settlement of account.

When a mortgage is given by a customer to his bankers for a fixed sum, and not for the running balance, the banker cannot include that sum in the banking account and charge compound interest on it.

Bankers had a mortgage and a banking account with their customer:—

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mortgaged was sufficient to keep down the interest, and to satisfy all other payments in respect of the principal, and that it left a balance which the bankers impounded and applied in reduction of their debt.

That the account between them had always been an open and running account, and that from the last account rendered, it appeared, that the Defendants claimed a balance of 2,040*l.* 12*s.* 5*d.*, but that it would have been much smaller, if proper allowances had been made.

The Plaintiff prayed, that proper accounts might be taken of the mortgages and of the moneys received on account of the property comprised in the securities, and that the Plaintiff might be allowed the income tax charged against him. It asked a declaration, that, after the 1st *January*, 1853, the Defendants were only entitled to charge interest on the principal sum for the time being at the rate of 4*l.* per cent. only. It was also asked that the accounts might be taken as between debtor and creditor, on the footing of mortgage transactions, and a declaration that the Defendants were not entitled to compound interest.

The Defendants said, that the Plaintiff opened a banking account with them, without any special agreement as to terms, and that it was opened and throughout carried on according to the usual recognized mercantile custom adopted in dealings between *London* bankers and their customers.

They then stated, in substance, that the custom was, when a customer over-drew his account, that the bankers charged interest due from him from day to day, and when making the periodical rests in the accounts, thenceforth to

to turn such interest into principal and carry it forward as principal carrying interest. That another part of such custom was, to send a pass book to the customer, which became and was deemed and taken to be, according to the custom, a stated and settled account, unless objected to within a reasonable time.

That such custom of bankers had been adopted and acted on in their dealings with Mr. *Mosse*, and that they, throughout, on the faith and reliance thereof, made advances and payments to and for him and on his account, and abstained from compelling him to pay, and gave him time for repayment of the debt, from time to time, due from him on their dealings. That in 1845, they, as his bankers, advanced Mr. *Mosse* 2,150*l.* to pay for railway shares, upon a written promise to repay it in one month, that this fact led to his overdrawing his account; that further sums had since been paid to his order, which increased the debt, and that, in making up his account at the end of the year, they charged, according to the custom, interest on the daily overdrawn balances, and made the accustomed annual rest in his account, and that they stated, at the foot, in one sum, the amount due from him for principal and interest, as the sum or balance standing to his debit, on or as on the last day of the year 1845, and that they sent a copy of such account to Mr. *Mosse* on the 6th *January*, 1846.

That a similar account was made out, immediately previous to the securities given for the sum of 2,678*l.* 8*s.* 1*d.*, without any objection having been, at any time, made to them, and that the securities of the 5th *November*, 1846, and the 29th *December*, 1847, proceeded on the footing of such accounts, and contained a covenant to pay not only interest at 5*l.* per cent., but also the premiums on the policies.

They

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They also said, that the moneys comprised in the securities were not loans upon mortgage, but advances made by them, in a course of business between banker and customer, to be dealt with according to the custom between banker and customer.

The Defendants then said, that the accounts were bankers' accounts between them and Mr. Mosse, that they were sent in yearly, and occasionally at shorter periods, but always once a year, without any objection being made to them, and that they were always in the usual form according to the custom of bankers with their customers, and that the moneys for which they had security were treated as sums due on an overdrawn account, and that the Plaintiff was charged with interest, computed on the balances as overdrawn and due, from time to time, on his banking account. And they submitted that such a course of dealing was proper and that the accounts so settled prior to 1859 were settled accounts.

They also said, that it was the custom of bankers not to make any deductions or allowance in the customers' accounts for income tax, in respect of interest on overdrawn accounts of customers; that it would add to the labour and embarrassment of bankers in their business; that the customer was not damnified in the end, as, if otherwise, the business with the customer would be arranged to meet the objection, and the government was not damnified, as the banker, in his return of profits, paid the income tax on the interest he charged against the customer. They further said, that the retention of the accounts by Mr. Mosse prevented this objection from being now made; that the income of the Plaintiff came into their hands as bankers; that the Plaintiff had a drawing account which was more frequently

frequently overdrawn than otherwise ; that the annual income of the property in the securities was not sufficient to keep down the interest on the money advanced and satisfy the other payments to which it was liable. That the Plaintiffs were justified in charging the bank rate of interest on the overdrawn banking account, and that they were not bound to apply any small temporary balance in discharge of their debt, and if they were to be treated as mortgagees, they were not bound to take their debt in dribs and drabs. They claimed the benefit of the customary mode of dealing between banker and customer.

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The cause came on upon a motion for a decree.

Mr. Selwyn and Mr. Loudon for the Plaintiffs.

Mr. Lloyd and Mr. Pole for Messrs. Salt.

The cases cited were *Lord Clancarty v. Latouche* (*a*) ; *Rufford v. Bishop* (*b*) ; *Henniker v. Wigg* (*c*) ; and see *Bate v. Robins* (*d*) ; *Crosskill v. Bower* (*e*) ; *Boddam v. Ryley* (*f*) ; *Fergusson v. Fyffe* (*g*).

Mr. Selwyn in reply.

*The MASTER of the ROLLS.*

It is necessary, in all these cases, to distinguish between what is a banking account, as between banker and customer, and what is an account as between mortgagor and mortgagee. There can be no question, that

- (*a*) 1 *Ball & Beat.* 428.
- (*b*) 5 *Russ.* 346.
- (*c*) 4 *Q. B. Rep.* 792.
- (*d*) *Ante*, p. 73.

- (*e*) *Ante*, p. 86.
- (*f*) 1 *Bro. C. C.* 239 ; 2 *Bro. C. C.* 2, and 4 *Bro. P. C.* 561.
- (*g*) 8 *Cl. & Fin.* 121.

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that when a banker and customer carry on a banking account for a series of years, upon a certain specified system, then (assuming it to contain nothing illegal) the Court will assume that there is an agreement between the customer and the banker, and that the account shall be kept upon that principle. In *Lord Clancarty v. Latouche*(a) it is distinctly stated, that acquiescence does not amount to a settlement of account, though it regulates the principle on which the accounts shall be taken. Where it is simply a banker's account, it amounts to an agreement as to the mode in which that account should be kept, but it does not at all amount to a settlement of account; after it, the customer would be at liberty to dispute and contest the items though not the principle upon which the bank account is kept. Is this then a question as to the mode of keeping the banking account or is it a question between the mortgagor and the mortgagee? My opinion is, that this mortgage is not a security for the balance of a bankers' account; to come to that conclusion I must alter the deed, which I cannot do, but it is a security for the sum of 2,678*l.* 8*s.* *Id.*, which was the balance of an account settled down to the 1st of *October*, 1846. It is quite immaterial what was due before, as both parties agreed upon the amount then due, and they have executed a deed upon that basis, and the proof is, that Messrs. *Salt* treat it as a sum secured by the deed, on which interest was to be paid.

The mode in which they have kept the subsequent account is therefore one that cannot be sustained. Not only, by the deed, is it expressly stated that the whole property shall be redeemable on the 5th of *May* following, if the principal and interest up to that time is paid,
but

(a) 1 *Ball & B.* 428.

but in fact, in keeping the accounts, Messrs. Salt charge interest upon that mortgage sum on the 1st of *January* following, in making up the balance of their banking account. So that, on the 5th of *May*, although the amount would be very small, yet it is clear that interest would be charged as due on the 1st of *January*, although by the deed it was not payable until the 5th of *May*, and there would be interest running upon that interest until the following year.

I am of opinion that none of these deeds are a security for the balances of the banking account which may become due from time to time, but they are all securities for a fixed and definite sum. In the absence then of express contract, it is not open to the Defendants to charge compound interest upon them, and they cannot, in keeping these accounts, charge the interest due upon a particular day, and then say that interest runs upon that interest from time to time, bringing it all into one general banking account. That would be to contradict a deed under their hand and seal, which expressly states that this property is given as a security for a fixed sum, and not as a security for the balances due on a running account.

The consequence is, that I must first eliminate from the accounts to be taken between the Plaintiffs and the Defendants, the total amount of that mortgage debt and the interest upon it, and I shall treat that mortgage debt as a fixed sum, with a certain arrear of interest due upon it (I was informed it was between 1,600*l.* and 1,700*l.*), and accordingly, I shall calculate the amount due for principal, interest and the costs relating to the mortgage. In so doing, I shall certainly not allow the retention by the mortgagee of any sum of money in respect of income tax; it is said to be a small sum,

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60*l.* or 70*l.* for the whole period, but for that period I shall deduct the amount of the income tax from the interest: I entertain no hesitation or doubt upon that subject. It is very true, that in dealings between merchants, such as in the discounting of bills and the like, and on loans made for short periods, the income tax is not deducted; but it is equally clear, that in the mode of taking the accounts (whatever it may be) in the city of *London*, and the mode of taking the accounts in Chancery, in all cases of mortgagor and mortgagee, when the Court has once arrived at the conclusion that it is a case of mortgagor and mortgagee, the mortgagor is entitled to deduct the income tax from the interest paid to the mortgagee, which he necessarily has paid on the property mortgaged, either in the shape of deduction from his rents, or from his dividends prior to that period, and, accordingly, this is so provided by the act (a).

Upon what principle then is the account to be taken? There is an account between the parties on the mortgage, and looking at the cheques which were handed up to me there is also a banking account. Assuming that to be so, I ought to take the banking account separately and distinctly from the mortgage account. I must take the mortgage account as an item by itself; there will be a sum of 2,678*l.* 8*s.* 1*d.*, and interest upon it, less the amount of the income tax; that is one item. There are also the dealings and transactions between the same periods to be taken upon the principle of a banking account, and with interest on rests, according as the custom of merchants might apply, but upon that, I should require evidence to shew what the account was when it was taken in that form.

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(a) 5 &amp; 6 Vict. c. 35, s. 60, No. 4, Rule 10.

As far as I can judge from looking at the accounts, I should be of opinion that, in taking the account in that form, there would be a balance due to the Plaintiff nearly up to the end of 1853 and the beginning of 1854; then a balance against him to an amount of something like 1,500*l.* to 2,000*l.* for the five following years, and then a balance again in his favour. It is not material for my purpose whether I am right or wrong in that view, but this would be the way in which the account would be taken, and what was due on the balance of that account would be added to or set off against the amount of principal and interest due on the mortgage debt.

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It is clear that, in this state of the case, I cannot treat this as a mere mortgage suit for redemption, as I thought at one time that I must; but I am clear there were dealings and transactions between these parties other than and distinct from the mortgage: I cannot treat it as a simple mortgage account. I must reserve further consideration, and I must necessarily reserve the costs until the hearing on further consideration. I must, however, take the whole of that account, and it will be open to the parties, in chambers, to give any evidence respecting the custom of merchants or the custom of bankers in regard to the mode in which this particular account ought to be taken, assuming the whole of the mortgage transactions to be eliminated and taken out of it. There will be a balance on the mortgage account due to the Defendants. That there will be a balance due to the Plaintiff on the other account is obvious, this will have to be set off against the other; should there be any disputed items, they must be gone into upon taking the account.

The cases which have been referred to lead to the same

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same conclusion. Not only in *Lord Clancarty v. Latouche* (a), but in *Rufford v. Bishop* (b), the Court expressly stated, that when a deed was given to secure the balance of a bankers' account, as it might vary from time to time, the account would then be taken on that basis; but not if it were a mere mortgage security. In *Henniker v. Wigg* (c), the security was a bond which was silent on the subject of accounts, it expressed no purpose further than that it was to secure a certain sum, and there the Court was of opinion, upon the dealings of the parties, that the bond was given to secure the balances of the account as they might arise from time to time. All these cases concur as to the principle on which the account should be taken.

I must, therefore, take an account of what is due for principal, interest and costs on the several mortgage securities, and I must also take an account of all other dealings and transactions between the Plaintiffs and Defendants, and in taking such accounts, I must ascertain what, if anything, is due on account of Mr. Bowker's bill of costs, then ascertain the balance due on each of such accounts and set off the one against the other. Reserve further consideration and costs.

(a) 1 *Ball & B.* 428.  
(b) 5 *Russ.* 346.

(c) 4 *Q. B.* 792.

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## HART v. TRIBE. (No. 4.)

Jan. 17.

THE testator, by his fifth codicil, bequeathed to his wife *Maria* 4,000*l.* "to be used for her own and the children's benefit as she shall, in her judgment and conscience, think fit, being convinced that it will be disposed of conscientiously and properly by her for the purposes mentioned, at the same time recommending her not to diminish the principal, but to vest it in government or freehold securities."

The testator died on the 12th of *October*, 1851.

The Court on a former occasion (*a*) had decided that "the children" referred to in this fifth codicil were *Emily*, who was the testator's daughter by his wife *Maria*, and *Frederick* who was not.

The Court, on a subsequent occasion (*b*), said, "this, in substance, is a gift to her for life, to be employed in such a manner as she shall think fit for the benefit of herself and the children, fairly and honestly exercising that discretion, and subject to that, the children take an interest in the capital. Accordingly, what I propose to do is, to direct that this sum shall be invested, and that the dividends shall be paid to her from time to time, with liberty to apply, and then if it shall turn out that any one of the children is really neglected, and that she ought, according to the directions contained in the will, properly to do something for the benefit of that child,

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(*a*) 16 *Beav.* 510.

(*b*) 18 *Beav.* 219.

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an application may be made to me and I shall know how to deal with it. At all events, there will be liberty to apply during the life of the widow or after her death, but I am of opinion, that, in the meantime, the interest arising from the fund must be paid to her, to be disposed of by her, as she in her judgment and conscience thinks best for the benefit of herself and the children."

The widow married again and appointed 500*l.* after her decease to *Frederick* (who was not her child), and the remaining 3,500*l.* to her own daughter *Emily*.

On a subsequent occasion (*a*), the Court directed 30*l.* a year to be allowed for *Frederick B. Hart's* maintenance.

The two children having now attained twenty-one, a petition was presented for payment of the 3,500*l.* out of Court.

Mr. *Hobhouse* and Mr. *Cookson* in support of the petition. The widow claims a power of exclusive appointment by deed or will. It is put at her "disposal" as she shall think fit. As in *Crockett v. Crockett* (*b*), she is "either a trustee with a large discretion as to the application of the fund, or she has a power in favor of her children, subject to a life estate in herself." In *Ward v. Grey* (*c*), a gift to a lady and her family or children was held to give her a life interest with a power to appoint to the children. [The MASTER of the ROLLS: I do not know how I arrived at that conclusion. I doubt whether she has any power of appointment except by

(*a*) 19 *Beav.* 149.  
(*b*) 2 *Phil.* 561.

(*c*) 26 *Beav.* 494.

by will.] If she has power by will she has power by deed; *Burrell v. Burrell* (*a*).

Mr. *F. White* and Mr. *T. E. Lloyd*, *contra*, for *Frederick*, opposed the application. They said that the case had been decided on a former occasion, *Hart v. Tribe* (*b*), and that, by the order then made, the fund was carried over and the dividends were ordered to be paid to the widow for life with liberty to apply at her death. They argued that the discretionary trust could not be destroyed; they contested the validity of the appointment, and submitted that this application was therefore premature. They cited *Pride v. Fooks* (*c*); *Longmore v. Elcum* (*d*); *Shovelton v. Shovelton* (*e*); *Barnes v. Grant* (*f*).

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Mr. *Martindale* for *John Dyke* the husband.

Mr. *Hobhouse* in reply.

The Master of the Rolls.

I have looked at the cases on the subject, and consider they are not in a satisfactory state, and that must be admitted. In the view I take, I think that the meaning of the testator was this: that this lady should have no power to dispose of any part of the capital during her life, and that the words "recommending her not to diminish the principal" have a controlling effect and prohibit her dealing with it; but the interest must be used for her own and the children's benefit *bonâ fide* during

July 19.

- (*a*) *Ambl.* 660.
(*b*) 18 *Beav.* 215.
(*c*) 2 *Beav.* 430.

- (*d*) 2 *Yo. & C. (C. C.)* 363.
(*e*) *Ante*, p. 143.
(*f*) 26 *L. J. (Ch.)* 92.

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during her lifetime. I shall not express any opinion as to whether she has power to appoint the fund between them, or whether it is to be divided between them equally. I am of opinion it is premature to express any opinion on the subject, and I cannot therefore allow any part of the capital of the fund to be taken out of Court.

NESBITT v. BERRIDGE.

BUTLER v. BERRIDGE.

Jan. 28, 29.

A. B. sold to *C. D.* a life interest in possession (subject to a mortgage for 800*l.*) and a reversionary interest in two sums of money. The price paid for the whole was 75*l.*, and within a month *C. D.* sold it for 125*l.* to *E. F.*, who within three months afterwards sold it to *G. H.* for 550*l.* The value of the property in possession (free from the mortgage) was 1,331*l.*, and of the property in reversion 312*l.* The purchase was set aside as against *G. H.* (who was held to have notice), on the ground of its being a purchase of a reversion at an undervalue.

GENERAL *Nesbitt*, by his will dated in 1844, appointed Mr. *Blake* and Mr. *Blacklock* "trustees to the under-mentioned property, to be held by them in trust for his son *Ray Nesbitt*." He proceeds thus:— "My son is to receive, by quarterly instalments, 90*l.* per annum until he becomes thirty-five years of age, and from thence 100*l.* per annum till he is forty years of age, and from thence 150*l.* per annum till he is forty-five years of age, and from thence 200*l.* per annum till he is fifty years of age, and on his arrival at the age of sixty, he is to receive the whole of the interest arising from my property. I make this arrangement in consequence of his propensity to extravagance, and to prevent his falling into debt and ruin. . . Should he die before his brothers the property is then to be divided between them," &c. "A part of my property is in *India* stock, which, at my death, is to be sold out and placed in their joint names in the £3 per Cent. Consols, together with any other property I may die possessed of.

of. I have also some reversionary property due to me on the death of Mrs. *Sambrooke* and *Samuel Wooley*: from the former (who is forty-seven years of age), 1,666*l.*, and from the latter (now forty-eight years of age), 700*l.*," &c. &c. "Should my son *Ray* marry and have children, my property is then, at his death, to be divided amongst them. But in default of his children it is to go to his brothers."

The testator died in 1844, and his will was proved by his widow and sole executrix. She got in the personal estate, and thereout purchased the sum of 3,978*l.* 4*s.* Consols, in the names of the two trustees; but the two reversionary sums still remained outstanding.

At the testator's death, his son (the Plaintiff) was between thirty-four and thirty-five years of age. In 1854 and 1855 he effected policies in the Clerical, &c., Society for 700*l.*, and in the Medical, &c., Society for 200*l.* By indentures of the 1st of *January* and the 19th of *November*, 1855, he assigned his interest in the 3,978*l.* 4*s.*, together with the two policies, to Miss *Jackson*, by way of mortgage for securing 800*l.*, and he covenanted to keep up the policies.

The Plaintiff afterwards got into embarrassed circumstances. He was introduced to Mr. *Daniel*, a solicitor, who undertook to obtain a loan for him. Mr. *Daniel* introduced him to *Simon Abraham Kisch*, his articled clerk, who made him small advances, and ultimately, on the 10th of *December*, 1856, *Kisch* agreed to purchase from the Plaintiff his interest in the annuity of 113*l.* 13*s.* 6*d.* (subject to the mortgages to Miss *Jackson*) and his expectant interest in the two reversions, together with his interest in the two policies, for the sum of 75*l.*

Two

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Two months afterwards, *Kisch* sold the property to Mr. *Bunyard* for 125*l.*, and by a deed, dated the 7th of *January*, 1857, in consideration of 75*l.* paid to the Plaintiff by *Bunyard*, and of 50*l.* paid by him to *Kisch*, the Plaintiff and *Kisch* assigned the property to *Bunyard*.

Bunyard allowed the two policies of 800*l.* and 200*l.* to drop, and on the 5th of *January*, 1859, he effected a policy in the *Anchor Company*, on the Plaintiff's life, for 1,200*l.*, which Miss *Jackson* agreed to accept in lieu of the two other policies.

Afterwards, Miss *Rogers* (now Mrs. *Berridge*) purchased the annuity, the reversionary interest and the new policy (subject to the mortgage) for 550*l.*, and the same were conveyed to her by *Bunyard*, by an indenture dated the 21st of *March*, 1857, and she thereby covenanted to pay Miss *Jackson's* mortgage.

Miss *Rogers* afterwards paid off Miss *Jackson's* mortgage and obtained a transfer of the security and of the policy for 1,200*l.*

The testator's son filed this bill in 1860 to set aside the purchase as against all parties. The bill was amended several times; but ultimately the Defendants were *Berridge* and wife, *Kisch*, *Bunyard* and *Cave* (who had negotiated the purchase from *Bunyard*, and had received one-half the profit). *Nesbitt's* bill did not claim the policy of 1,200*l.*

In *September*, 1861, the Plaintiff died, and the amount due on the policy was received, after which, the executor of the original Plaintiff filed a supplemental bill, claiming the produce of the policy for 1,200*l.*

The

The two causes now came on for hearing.

The Defendants gave no evidence as to the value; but the Plaintiff produced the affidavit of Mr. Browne, the actuary of an insurance company, who valued the annuity from the 3,978*l.* Consols at 1,331*l.*, and the reversionary interest in the 1,666*l.* and 700*l.* at 312*l.*

Mr. *Lloyd* and Mr. *Birkbeck* for the Plaintiff. A substantial part of the property purchased was a reversionary interest, and therefore the purchaser is bound to shew that he gave full value for it; *Edwards v. Burt* (*a*) ; *Bromley v. Smith* (*b*). Far from doing so, it is shewn that the purchase was made at a gross undervalue, even if the whole purchase-money be attributed to the reversionary interest. The purchase, therefore, cannot stand.

Secondly, the purchase was made by *Kisch*, a clerk of the Plaintiff's solicitor, who stood in such a fiduciary relation towards the vendor as to preclude his purchasing; *Ex parte James* (*c*) ; *Hobday v. Peters* (*d*) ; and the transaction was tainted with fraud.

Thirdly, the purchasers from *Kisch* had notice either absolute or constructive, and, as purchasers of a *chose in action*, they took only the interest of their assignors and stood in their place; *Cockell v. Taylor* (*e*) ; *Parker v. Clarke* (*f*). They were bound to make due inquiries; *Mangles v. Dixon* (*g*) ; and are affected with the notice which they would certainly have received if they had made due inquiries.

Mr.

- (*a*) 2 *De G., M. & G.* 56.
- (*b*) 26 *Beav.* 644.
- (*c*) 8 *Ves.* 345.
- (*d*) 28 *Beav.* 349.

- (*e*) 15 *Beav.* 118.
- (*f*) 30 *Beav.* 54.
- (*g*) 3 *H. of L. Cas.* 702.

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Mr. *Hobhouse* and Mr. *Dickinson* for Mr. and Mrs. *Berridge*. This was substantially a purchase of a life interest in possession, and nothing was ever received from the reversionary life interest which failed upon the death of Mr. *Nesbitt*. This is not such an interest as comes within the doctrine applicable to purchases of reversionary interests; *Wardle v. Carter* (*a*), and see *The Earl of Portmore v. Taylor* (*b*). Secondly, *Daniel* was not the Plaintiff's solicitor, but his real adviser was a Mr. *Daly*. Thirdly, these Defendants are purchasers of this property for valuable consideration without notice.

Mr. *Jessell* and Mr. *Hardinge* for *Kisch*, argued, that he had improperly been made a party. That the bill was demurrable as to him, but that the charges of fraud had rendered it necessary for him to answer the bill and to displace them; *Le Texier v. The Margravine of Anspach* (*c*); *Bowles v. Stewart* (*d*); *Marshall v. Sladden* (*e*).

Mr. *J. W. De L. Giffard* for *Bunyard*.

Mr. *Martin* for *Cave*.

Mr. *Lloyd* in reply.

### *The MASTER of the ROLLS.*

I am of opinion that this transaction is really a purchase of a reversionary interest, and that it cannot stand. It is true that it is a purchase of a reversionary interest mixed up with the purchase of something else in

(*a*) 7 *Sim.* 490.

(*d*) 1 *Sch. & Lef.* p. 227.

(*b*) 4 *Sim.* 182.

(*e*) 7 *Hare*, p. 441.

(*c*) 15 *Ves.* p. 164.

in possession, but it is a distinct purchase of *Nesbitt's* reversionary interest in two sums, one of 1,666*l.*, another of 700*l.*, one expectant on the decease of Mr. *Sam-brooke* and the other of *Samuel Woolley*. It is true, also, that it was a purchase of a life interest only in these sums; but it would be a new doctrine to me to hold, that the rule as to purchases of reversions is not equally applicable to the purchase of a reversionary life interest as to the reversion of the capital sum. I apprehend that it is the duty of a purchaser of a reversionary life interest in a fund to shew that he gave the full value for it, that is, the burden of proof is on such purchaser. It is unnecessary to go into the question of whether this Court would set aside a deed partially and not wholly, that question does not arise where the purchase-money is not apportioned between the reversion and the annuity in possession, but consists of one gross sum paid for the whole.

The question which I have therefore to consider is, whether 75*l.* was a full and adequate sum for the purchase, and the burden of proof being on the Defendants, they have gone into no evidence on the subject. But there is the evidence of Mr. *Brown*, who values the reversion alone at 312*l.* It is true that the reversion has produced nothing, because Mr. *Nesbitt*, although eleven or twelve years younger than the tenants for life in possession, died before them. But subsequent events cannot substantially affect the case; the Court must look at the value at the time of the purchase, and I have only to consider the value at that time.

My experience in all cases of experts, surveyors and actuaries certainly is, that they always, and probably unavoidably, give the evidence favourably to the parties  
who

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who employ them, and therefore I must assume that Mr. *Brown's* is a high valuation. But I have the strongest possible proof, in this case, that the property was sold at an undervalue, for a few days after Mr. *Kisch* gets an advance of 50*l.* on his bargain, which was 75*l.* It is true that 50*l.* is not a large sum, but relative to the price given it is a considerable increase, being two-thirds of the price. I have also the fact that Mrs. *Berridge* was induced to give 550*l.* for the very same thing within the space of three months afterwards; whether she did or did not give much more than it was worth is another question which I do not now go into; nevertheless I must admit, from the whole of the evidence before me, that she gave a very high price for it. But it is obvious it was worth more than 75*l.*, and there is no possible mode of treating it, by which it does not appear to be worth more, nay, much more than the 75*l.* given for it. Miss *Rogers*, I allow, knew very little about the law relating to transactions of this kind; but *ignorantia legis neminem excusat* is a maxim of law essential to the due administration of justice. She had her solicitor and counsel to advise her, and she must be bound. She knew from the deed of the 10th of *December*, 1856, that the Plaintiff had sold this reversion and the annuity for 75*l.*, that Mr. *Bunyard* had given 125*l.* for it on the 7th of *January*, 1857, and that she herself was about to give 550*l.* in the month of *March* following. It is obvious that this was distinct notice that it had been sold at an undervalue, the value being what it would fetch in the market. This lady thought that its value was 550*l.* and she was willing to give that sum for it. She was bound to know what the law was, and that the agreement for the assignment by the Plaintiff was worth nothing except as a security for the money advanced. The result is, that she bought this property with her eyes open,

open, knowing that an inadequate price had been originally given for it, and therefore she can only hold it as a security.

If the matter rested there I should follow the case of *Forster v. Robertis* (*a*), and give no costs on either side ; but considering the offer before suit, which was refused, I think that the costs up to the hearing must follow the event. The Defendants, *Berridge* and wife, must pay the costs of this suit up to and including the hearing ; but they must have their costs of the suit, as far as such costs have been increased by making *Kisch*, *Bunyard* and *Cave* parties.

His Honor next considered the case of *Kisch*, *Bunyard* and *Cave*, and he held that the bill must be dismissed as against them, but without costs.

The supplemental bill appears to me to be wholly unnecessary, and I think it must be dismissed with costs against all the Defendants.

(*a*) 29 *Bean.* 467.

**NOTE.**—Another important question was, whether the Plaintiff was entitled to the produce of the policy for 1,200*l.* The Master of the Rolls thought that the rights were correlative, and that a person could have no right to the produce of a policy who was under no obligation to pay the premiums. Upon appeal, the Lord Chancellor (Lord Westbury) took a different view of the case, as to this point. See 10 *Jur.* 53.

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*Feb. 11, 12.  
March 17.*

A settlement, made by a woman pending an engagement and seven weeks before her marriage, without the knowledge of her intended husband, and in favor of persons for whom she was under no legal or moral tie to provide, was set aside as a fraud on the husband's marital right.

A delay of two years and a-half after knowledge in taking proceedings to set aside a deed as a fraud on the marital rights, held not sufficient to deprive the husband of his right to relief.

Assuming that in *Hunt v. Matthews* (1 Vern. 408) the settlement was made after the treaty for marriage, it is difficult to reconcile it with Lord Thurlow's observations in *Strathmore v. Bowes* (1 Ves. jun. 28).

### DOWNES v. JENNINGS.

THIS suit was instituted by Mr. *Downes* to set aside a deed executed by his wife shortly before her marriage with the Plaintiff, on the ground that it was a fraud on his marital rights.

The facts were these:—In June, 1849, *Thomas Bygrave*, by his will, gave an annuity of 70*l.* to *Fanny Marshall*, the widow of an adopted son, for her separate use for life, without power of anticipation, with a proviso, by which the testator reduced the annuity to 40*l.*, in case *Fanny Marshall* should marry during the life of the testator's wife.

The testator died in 1852.

*Fanny Marshall* and the Plaintiff had previously become attached to each other, but, as their means were not large, they determined to live together as husband and wife, and to delay the solemnization of their marriage until after the death of Mrs. *Bygrave*, the testator's widow.

The widow died on the 26th *October*, 1857.

For upwards of a year and a half, the Plaintiff and Mrs. *Marshall* did not think fit to marry, and during the greater part of that time they lived apart. However, on the 8th of *May*, 1859, their marriage was solemnized.

Previously

with Lord *Thurlow's* observations in *Strathmore v. Bowes* (1 Ves. jun. 28).

Previously to this marriage Mrs. *Marshall* was possessed of a leasehold house in *Bloomsbury Square*, having, in the month of *March*, 1859, seventy-seven years and four months unexpired. The ground rent was 34*l.* per annum, and the improved rent, in *March*, 1859, was 140*l.* per annum; leaving a net rent of 106*l.* per annum.

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On the 22nd of *March*, 1859 (about seven weeks before her marriage), Mrs. *Marshall* executed a settlement of this house, which was to the following effect:—By it, Mrs. *Marshall* assigned the premises, with the appurtenances, for the residue of the lease, to the Defendants, Mr. *Jennings* (her son-in-law) and Mr. *Wheatly* (her brother), their executors, administrators and assigns, in trust to pay the ground rent, keep the premises in repair and insured against fire, and observe the covenants in the lease, and subject thereto, to pay the surplus rents to Mrs. *Marshall* for her life, for her separate use, without powers of anticipation; and after her decease, to pay 20*l.* per annum to Mrs. *Wheatly* (the mother of Mrs. *Marshall*); then to pay an annuity of 50*l.* per annum for the maintenance and education of *Jane Marshall* (the putative daughter of Mrs. *Marshall* and the Plaintiff); to be increased to 70*l.* per annum on the decease of Mrs. *Wheatly*, and on her attaining twenty-one or marrying, for her sole and separate use, without power of anticipation, with a power to her to appoint it by will; and after this to pay and apply the residue of the rents of the house towards the maintenance and education of the son of Mr. *Jennings* by *Kezia* his wife (who was the daughter of Mrs. *Marshall*), notwithstanding his father should be of full ability to maintain and educate him; and if the son died under twenty-one, then in trust for all and every other the children of Mrs. *Jennings*, to vest absolutely in the sons at twenty-one,

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and the daughters at twenty-one or marriage, with power to the trustees to apply the surplus rents, during their minority, for their maintenance and education, notwithstanding their father should be of ability to maintain and educate them. And in case there should be no child of Mrs. Jennings who should attain a vested interest, then (together with the annuity of 70*L*) for *Jane Marshall*, and in case that annuity or any portion of it should fail, then in trust for Mrs. Jennings, for her absolute use and benefit. But if she should be dead, then in trust to sell the premises and to divide the proceeds equally among the seven brothers and sisters of Mrs. *Marshall*, by name.

The Court was of opinion, on the evidence, that the Plaintiff was ignorant, until after his marriage, of the fact that any such settlement had been executed; he knew it, however, in *August*, 1859. This bill was filed in *January*, 1862, against Mrs. *Downes* and the parties interested under the settlement of *March*, 1859, and it prayed a declaration that the settlement was a fraud on the Plaintiff's marital right, and that it might be delivered up to be cancelled.

Mr. *Selwyn* and Mr. *Elderton*, for the Plaintiff, argued, that as the settlement had been made pending an existing engagement to marry, and without the knowledge of the intended husband, it was a fraud on his marital rights and could not stand; *Carleton v. The Earl of Dorset* (*a*); *The Countess of Strathmore v. Bowes* (*b*); *England v. Downs* (*c*); *Goddard v. Snow* (*d*); *Taylor v. Pugh* (*e*).

Mr.

(*a*) 2 *Vern.* 17.
(*b*) 2 *Bro. C. C.* 345; 1 *Vex.*
22; 2 *Cox*, 28, and 6 *Bro. P. C.*
427.

(*c*) 2 *Beav.* 522.
(*d*) 1 *Russ.* 485.
(*e*) 1 *Hare*, 608.

Mr. Baggallay and Mr. Nugent, for Mrs. Downes.

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Mr. *Lloyd* and Mr. *Shebbeare*, for the other Defendants who claimed interests in the property under the settlement, argued, first, that no engagement of marriage existed between Mr. and Mrs. *Downes* at the date of the settlement, it having been previously broken off, and that therefore there could be no fraud on the Plaintiff's marital right. Secondly, that fraud, as applied to cases of this nature, consisted in the wife's falsely holding out that her estate was unfettered, and that this Court would not interfere with a proper settlement made prior to the marriage. Thirdly, that the delay in instituting the suit constituted a bar to equitable relief; *St. George v. Wake* (a); *De Manneville v. Crompton* (b).

*Mr. Elderton* in reply.

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### *The MASTER of the ROLLS.*

The first question is one of fact, viz. whether this settlement was executed in contemplation of the marriage, which was solemnized seven weeks afterwards? If this be answered in the affirmative, then arises the second question, which is one of law, viz. whether, having regard to the contents of this settlement, it can properly be considered to be one in fraud of the marital right. If this also should be decided in favor of the Plaintiff, then the time suffered by him to elapse before filing the bill remains to be considered.

March 17.

The first question depends, in my opinion, on whether  
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(a) 1 *Myl. & K.* 610.(b) 1 *Ves. & B.* 354.

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the evidence establishes, first, that the Plaintiff and Mrs. *Marshall* were ever engaged to marry previous to their actual marriage; secondly, whether, if they were, this engagement, or rather an active intention on their part to marry, was subsisting at the time when this settlement was executed; and, thirdly, whether, when this settlement was executed, the intended marriage was then settled to take place immediately or within some short space from that time.

That they were originally engaged in 1852 and intended to marry at some subsequent time is, I think, conclusively established by the evidence, and indeed is hardly contested on the other side. Whether that engagement was subsisting in *March*, 1859, or had been broken off by mutual consent, is a question of more doubt. I think the result of the evidence is, that they continued to live together till the end of 1856; that they then separated, and that, though the Plaintiff occasionally visited Mrs. *Marshall*, she was, in *October*, 1857, when Mrs. *Bygrave* died, living alone, and that she continued to do so till the end of 1858, but that the Plaintiff frequently visited her.

I think, on the whole of the evidence, that the engagement was never broken off, and that at the time of the settlement in *March*, 1859, Mrs. *Downes*, then Mrs. *Marshall*, was aware that she could induce the Plaintiff to perform his engagement, and that she intended to do so when the settlement was executed. I have looked, in vain in the evidence, for any reason to explain why this settlement was prepared and executed at that time (just seven weeks before the marriage) beyond the belief and expectation, on the part of herself and entertained by her relations, that the marriage was about to take place; and I think also, on the evidence, that

that she was induced to execute the settlement by her relations, in order to protect her against the possibility of her husband, the Plaintiff, disposing of her property.

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If I am right in this conclusion of fact, then the question of law arises, whether, having regard to the contents of the settlement, it is one which can be allowed to stand, and I am of opinion it cannot.

The greatest length any case has gone, that I am aware of, is the case of *Hunt v. Matthews* (*a*), where a widow, before her second marriage, assigned the greatest part of her estate as a provision for her children by the first marriage. In that case, the Court held, that she was justified in providing for such children before she placed herself under the power of a second husband. Assuming that, in that case, the settlement was made after the treaty for marriage, it is difficult to reconcile it with Lord *Thurlow's* observations in *Strathmore v. Bowes* (*b*). But, even in that case, the settlement was confined to the children of the first marriage, who were unprovided for.

But the settlement before me cannot be treated in so favorable a light. By this deed, present and contingent benefits are given to persons whom she was not bound to benefit by any legal or moral tie. As far as it appears, Mrs. *Marshall* had only one child by her first marriage, who was already provided for by marriage with the Defendant *Jennings*; the settlement in favor of her mother and of her putative daughter, though proper to be done under ordinary circumstances, could not be supported as against her second husband, if done

(*a*) 1 *Vern.* 408.

(*b*) 1 *Ves. jun.* 28, and see *Cotton v. King*, 2 *P. W.* 360.

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done without his knowledge. But what is still less favorable to the Defendants is, that under the provisions of this settlement, Mr. Jennings derives a considerable personal advantage, that is not considerable in itself, being only 25*l.* per annum, but considerable having regard to the property settled, inasmuch as it amounts to one-third of the net income of the whole property settled, and which one-third is to be paid to him, on the death of Mrs. Downes, for the support of his children, whether he be or be not of ability to maintain them; and if they should all fail, he takes it absolutely, for it is given to his wife unfettered by any restraint. It is to be observed also, that the settlement does not give any control over her property to Mrs. Downes herself, so that she could not, by will, dispose of any portion of it. If the paragraph 11 in the Plaintiff's affidavit be correct, and the Court should give credence to it, and it is not contradicted by the only person who could contradict it, viz., Mrs. Downes herself, it is impossible that this settlement can be maintained against the husband, unless he had been informed of it previously to his marriage. It is true, that two witnesses declare that he told them that he knew of it before his marriage; but this he expressly denies.

I have frequently expressed my sense of the danger which the Court would incur, if it trusted to the bare representation of one or more witnesses, who allege the Plaintiff told them that he was not entitled to the relief he seeks to enforce, such representation not being supported by any corroborative evidence or circumstance.

In this case, I am obliged to follow the rule I have laid down in such cases, for here, not only is there no corroborative testimony, but the probabilities are strongly against

against the evidence. If the Plaintiff knew of the settlement, it must have been because some one had informed him of it; who that person was is not suggested, the only persons who could have done so were the Defendants, the solicitors employed in preparing the instrument, or one of his clerks, but no one is brought forward to say that he gave him any information on the subject, and the whole transaction bears the impress of having been made in order to guard against his power over the property of Mrs. *Marshall*, which makes it improbable that it should have been communicated to him.

I must therefore, on the evidence, come to the conclusion that he was wholly ignorant of the settlement until after the marriage had been solemnized.

I am also of opinion that the engagement for the marriage had never been broken off, and that the Plaintiff believed that, when he became her husband, this property of his intended wife would enable him to support her, and that both the Plaintiff and his present wife, in *March*, 1859, at the time when the settlement was executed, contemplated a speedy realisation of that engagement. If this be correct, then the settlement was, in my opinion, a fraud on his marital rights, and one which could not be sustained if speedy steps had been taken to set it aside.

The Plaintiff, however, knew of it in *August*, 1859, and did not file his bill until *January*, 1862, nearly two years and a half afterwards. But, without adverting to the circumstances which are alleged in order to excuse this delay, I think that, in the present case, this delay will not disentitle the Plaintiff to the relief he asks. It is not suggested that any loss of evidence, material for  
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the decision of this case, has occurred, by reason of this delay, and in my opinion this Court would be pushing to an extreme length the principle on which it acts, where delay is held to deprive a Plaintiff of the relief he would otherwise be entitled to, if, in a case of this character and where time does not place the parties in a different position, it were to refuse to aid the husband, who had not instituted proceedings until *January, 1862*, to set aside the deed known first in 1859.

Upon the whole of this case, I am of opinion that the Plaintiff is entitled to the relief he asks; but I understand both the husband and the wife desire that a settlement should be made by the Court of this property. If this be so, I can save them the expense of a deed by declaring the trusts of it at once by this order.

The costs must follow the event.

NOTE.—See also *Griggs v. Staplee*, 2 *De G. & Sm.* 572; *Wrigley v. Swainson*, 3 *De G. & Sm.* 458; *Lewellin v. Cobbold*, 1 *Sm. & Giff.* 376; *Loader v. Clarke*, 2 *Muc. & G.* 382; *Grasebrook v. Percival*, 14 *Jur. (O. S.)* 1103.

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ELLICE v. ROUPELL. (No. 1.)

Feb. 26, 27.

THIS was a bill to perpetuate testimony, filed by two gentlemen named *Ellice* and *Manners Sutton* against *Richard Roupell* and *Sarah Roupell*.

The bill alleged, that *Richard Palmer Roupell* (deceased) was seised in fee of the *Roupell Park* estate, and that by an indenture of the 26th of *September*, 1853, and made between *R. P. Roupell* and *Sarah* his wife of the one part and *William Roupell* their son of the other part, *R. P. Roupell* and his wife, in consideration of natural love, conveyed the *Roupell Park* estate to *William Roupell* in fee. It alleged that this deed was executed by *R. P. Roupell* and his wife, and was attested by *Alfred Douglas Harwood*, and that it was duly acknowledged by *Mrs. Roupell* before Mr. Justice *Talfourd*.

William Roupell afterwards mortgaged the estate for 100,000*l.*, and the mortgages became vested in the Plaintiffs, who, in *February*, 1862, entered into possession of the estate, except a stable and coach-house.

Richard Palmer Roupell died in *September*, 1856.

In *April*, 1862, the interest being in arrear, the Plaintiffs advertised the estate for sale by auction, but

they

Held, that the plea could not be sustained, and that, if at all, it ought to have been pleaded in the first instance.

The 9th rule of the 14th Consolidated Order does not enable a Defendant who has answered the original bill to plead to it after amendment, where it still raises the same issue.

Principles and practice as to bills to perpetuate testimony stated.

The Plaintiffs filed a bill to perpetuate testimony, on the ground that the matters in dispute with the Defendants could not then be made the subject of judicial investigation. The Defendants answered, and the Plaintiffs then amended the bill in immaterial matters. The Defendants then pleaded, that since the answer, the Plaintiffs had themselves filed another bill, raising the point in dispute, and showing that the matters in question could now be made the subject of judicial investigation:—

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they were prevented selling it by a notice of *Richard Roupell* (another son of *R. P. Roupell*), who claimed the estate as heir at law or devisee of *R. P. Roupell*. The Plaintiffs thereupon brought an action of ejectment to recover the stable and coach-house, which *Richard Roupell* at first defended, but he withdrew before the trial and the Plaintiffs obtained judgment.

The bill stated, that the Defendants alleged that *R. P. Roupell* did not execute the conveyance of 1853, and that the Plaintiffs had no right or title to the estate, and that, upon the father's death, his son *Richard Roupell* became entitled to the whole estate. It also stated, that *Sarah Roupell* alleged, that on the death of her husband, she, as devisee under his will, became entitled to the estate. The Plaintiffs charged that there were several other persons besides *A. D. Harwood* (and one of whom was old and infirm), who could prove the validity of the indenture and the right of the Plaintiffs, and that *R. P. Roupell* admitted his son's title under the indenture. The Plaintiffs charged that the matters aforesaid, and in particular the validity of the said indenture, *could not be made the subject of judicial investigation*, and inasmuch as the Defendants might delay to dispute the validity of the indenture and to prosecute their claim, until such time as they might think proper, the Plaintiffs were in danger of losing the testimony of *A. D. Harwood* and the other witnesses.

The bill prayed, "that the Plaintiffs might be at liberty to examine *A. D. Harwood* and other their witnesses who could prove any matters or things tending to shew and establish the due execution, by *R. P. Roupell* and *Sarah* his wife, of the indenture of the 26th day of *September*, 1853, and the right and title of the Plaintiffs thereunder, upon the several matters thereinbefore

thereinbefore mentioned or any matters connected therewith, and that the testimony of *A. D. Harwood* and of other the Plaintiffs' witnesses might be recorded and preserved, in and by this honorable Court, in order to the perpetuity thereof, and that, if necessary, the Plaintiffs might have a commission for the examination of the said witnesses or any of them."

The Plaintiffs filed interrogatories, and Mrs. *Roupell* in December, 1862, put in a full answer thereto.

The then Plaintiffs amended their bill, and the only new statements were as follows:—That *R. P. Roupell* knew that he (*William Roupell*) entered into possession by virtue of the said indenture, and that from the time when *William Roupell* entered into possession, *R. P. Roupell* treated him as owner of the said estate. That they (the Defendants) admit, that in the year 1854 *William Roupell* entered into possession of part of the *Roupell Park* estate, and that they ought to set forth under what title he did so. That the Defendant *Sarah Roupell* admits that she executed the indenture of the 26th of September, 1853, and acknowledged it before a judge, and she ought to set forth the full particulars as to the said indenture and her execution and acknowledgment thereof, and as to *R. P. Roupell's* knowledge of the said indenture.

To the amended bill, *Sarah Roupell*, on the 16th of February, 1863, put in the following plea to all the discovery, relief and order sought by the bill:—

"Saith, that since the answer of this Defendant *Sarah Roupell* filed in this cause on the 17th December, 1862, the Plaintiffs have, on the 2nd February, 1863, filed a bill in this honorable Court against this Defendant *Sarah Roupell*, and also against *Richard Roupell*, and also

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also against *Frederick Chinnock*" and other parties [naming them], "and thereby the Plaintiffs state the contention of this Defendant *Sarah Roupell* and the said Defendant *Richard Roupell*, that the indenture dated 26th *September*, 1853, in the said re-amended bill stated, was a forgery, and deny the truth of such contention, and raise the issue, whether the said indenture was or was not a forgery, and pray that this Defendant, *Sarah Roupell*, and the said Defendant *Richard Roupell* may be restrained, by the order and injunction of this honorable Court, from commencing or prosecuting any action or actions to recover from the Plaintiffs the hereditaments which are comprised in the said indenture of the 20th of *January*, 1854, in the said re-amended bill mentioned. And, by the said secondly-filed bill, the Plaintiffs have made the several matters in the said re-amended bill mentioned, and in particular the validity of the said indenture dated the 26th *September*, 1853, the subject of judicial investigation. And this Defendant saith, that she has, since the filing of her said answer, ascertained, by the means aforesaid, that it is not true, and she saith that it is not true, that the said several matters in the said re-amended bill mentioned, and in particular the validity of the said indenture dated the 26th *September*, 1853, cannot be made, by the Plaintiffs, the subject of judicial investigation. All which matters and things in this plea stated this Defendant avers to be true, and pleads the same."

The plea now came on for argument.

Mr. Selwyn and Mr. C. Swanston, in support of the plea, argued, that the equity of the present bill depended on the statement of the inability of the Plaintiffs to make the matters in dispute the subject of judicial investigation at the present time; but that the contrary

now

now appeared from the second bill filed by the Plaintiffs themselves. That this fact, being introduced into the record by plea, displaced the equity on which the bill was founded. That the fact pleaded having occurred since the filing of the answer, it might properly be made the subject of a plea. That as to the technical difficulty in pleading, the General Orders (14th Consolidated Order, rule 9), provided against the old objection, that a plea was overruled by an answer.

Mr. Hobhouse and Mr. Cotton, for the Plaintiffs, argued that the objection raised by the plea, if valid, ought to have been pleaded at first to the bill, and that by answering, the Defendant had waived the objection. That the Defendant could not plead and answer to the same bill, such a course being inconsistent; and that the objection was not removed by the 14th Consolidated Order, rule 9, which only removed the technical difficulty, in cases where part of the subject covered by a plea was also answered; *Attorney-General v. Cooper* (a).

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The Master of the Rolls.

The plea comes on in a very unusual form. Two gentlemen named *Ellice* and *Manners Sutton*, who have advanced 100,000*l.* on the security of this estate, have filed this bill *in perpetuam rei memoriam*, to prove the validity of a deed which is impeached by the Defendants and is alleged to be a forgery. The course which this Court always adopts, in bills to perpetuate testimony, is very simple and straightforward. Where a person files such a bill raising an issue which can be tried at once at law, this Court holds, that it is not a

Feb. 27.

proper

(a) 8 *Hare*, 168.

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proper case for a bill to perpetuate testimony; on the contrary, as the evidence when taken cannot be used, if the witnesses are alive, and as the depositions are sealed up and can only be used when the case arises hereafter, it would be idle for this Court, when the question might be tried at once, and the witnesses themselves might be examined, to perpetuate their testimony.

If the case depend solely upon the testimony of one witness, or of witnesses who were very old, then the Court allows that person to be examined *de bene esse* without the necessity of a bill to perpetuate testimony.

But where a person in possession of an estate fears that another intends to impeach his title, upon the ground that the title deed by which he holds the estate is a forgery, then, as the person in possession can take no step to establish his title, and as the person out of possession will not bring an ejectment against him until his witnesses are dead, it has always been held, that the person in possession may file a bill to perpetuate the testimony of his own witnesses, in order to frustrate the design of the person who delays bringing forward his case until the witnesses who can speak to the truth of the defence are no longer in existence.

In this case, the Plaintiffs are mortgagees and have entered into possession, claiming, not the absolute title to the estate, but, as mortgagees only. They are accordingly liable to account hereafter to the rightful owner of the equity of redemption, in that strict and severe form in which this Court always directs the accounts to be taken as against mortgagees in possession. If this plea to the bill had been filed in the first instance, I should have had to consider whether the ordinary rule of the Court, which would undoubtedly

doubtedly apply if the Plaintiffs were in possession as purchasers of this estate, applied to the case of a mortgagee. A mortgagee can file a bill to foreclose and realize his security, and there are various other modes by which he might bring before the cognizance of the Court the question of the validity of this deed. If a mortgagee obtained a decree of foreclosure against the persons who alleged that the deed was a forgery, it would be impossible for them to contest the validity of that decree, after it had been enrolled and the time for appealing to the House of Lords had expired.

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I am much disposed to think, though I have not been able to find any authority on the subject, that if this plea had been filed in the first instance, it would have been a good plea, or perhaps upon the statement in the bill itself a demurrer might have been successfully filed to it. But the peculiarity of the present case is this:—The Defendant's pleader seems to have thought, upon the authority of the cases, that as the Plaintiffs, the mortgagees, were in possession of the estate, their case was analogous to that of purchasers of the inheritance; which they were at law though not in equity; and thereupon he answers the bill. The matter is carried on in a very peculiar form, for, by filing interrogatories, it is sought to make the bill perform the double function of a bill to perpetuate testimony and a bill of discovery. I do not wish to prejudge the question, whether the answer can be used at any future time in any other proceeding, but this is clear:—that the depositions cannot be used so long as the witnesses are alive, and that, if living, they must be examined again. It is also clear, that a Defendant may himself take advantage of a suit of this description. If the Plaintiff examine his witnesses and the Defendant merely cross-examines them, then the Plaintiff has to pay all the costs; but

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if the Defendant think fit to take advantage of the suit, he may examine his own witnesses to establish his own case, and then the costs are divided; but even then, the depositions of a deceased witness only can be used against the Defendant with relation to the subject matter stated in the bill.

Here the Defendant has thought fit to answer all the matters stated in the original bill; it is then re-amended, and the Defendant is called upon to answer all the various matters in the re-amended bill. This singularity then takes place:—in the Vice-Chancellor's Court another bill is filed by the Plaintiffs, and in which the validity of the mortgage deed is directly put in issue; that is to say, the validity of the conveyance to the mortgagor; and the Defendant then says, “If I had known this before, I would have pleaded it, because it depended upon you, the Plaintiffs, as you yourselves have shown, to bring the question in dispute before a Court for immediate decision.”

I am of opinion, that the fact of the Plaintiffs having done so does not alter the law on the subject, and that it was just as competent for the Defendants to do this when the bill was first filed as it is now. The Defendant was bound to know it, or at least cannot plead ignorance of the law as a justification for his acts. That being so, I think that when the Defendant pleads that this matter can at once be tried in Court, and that the Plaintiff himself has shewn that it can, he is merely doing that which he might have done in the first instance, and which would have made it unnecessary for him to answer any part of the bill.

It is true that the rule of pleading now is, that a plea does not overrule an answer; but I concur with the observation,

observation, that the object of the 9th Rule of the 14th Consolidated Order was, to prevent a *bonâ fide* plea from being overruled by the mere technical objection, that the plea covered a part of the same matter as the answer, and that this was the sole meaning of that order.

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There is, however, a great deal of substance in the old rule, that you must not answer a matter that is pleaded to. It is obvious that if you did, in a case where the bill asks for relief, the Plaintiff would not know what evidence he would have to adduce. But here this appears in a very striking form, for if the plea is allowed, the bill is out of Court, for the Plaintiffs can only take issue on the plea, and it is undoubtedly true, that the other bill stated in the plea has been filed in another branch of this Court. Therefore, this bill is out of Court if the plea be allowed, and yet the Defendants have answered all the matters contained in the original bill, and have even cross-examined the Plaintiff's witnesses. I am of opinion, that having so done, this Defendant is not at liberty, afterwards, to file a plea, and that if she intended to plead at all, she ought to have pleaded in the first instance.

That being so, I shall not allow the plea, but direct it to stand for an answer, and give the Plaintiffs liberty to expect.

1863.

March 20, 21.  
April 15.

Distinction between a bill to perpetuate testimony and a bill of discovery. The former is not a bill of discovery in the strict technical sense of the term.

A bill of discovery must be in aid of proceedings pending or about to be instituted, but the existence of such proceedings would be fatal to a bill to perpetuate testimony.

A bill to perpetuate testimony cannot, by amendment, be converted into a bill of discovery.

Whether a prayer for the perpetuation of testimony and for discovery can be united in one bill, *quare.*

The only discovery, which a Plaintiff in a bill to perpetuate testimony can require from a Defendant is, a sufficient admission of his title to examine such witnesses as he may think fit, on the various matters and issues stated in the bill.

A bill for perpetuating testimony, if brought to a hearing, will be dismissed with costs.

### ELLICE v. ROUPELL. (No. 2.)

THIS case, reported *ante*, p. 299, now came on for argument, on exceptions to the answer for insufficiency. The case was shortly this:—

The Plaintiffs filed a bill against *Sarah Roupell* and *Richard Roupell* to perpetuate the testimony of the due execution of a deed, which constituted the title of the property under which the Plaintiffs were mortgagees in possession, and which the Defendants alleged to be a forgery. The Defendant *Sarah Roupell* put in an answer to this bill, answering it fully. The Plaintiffs then amended their bill, to which they required an answer, and they filed seven interrogatories of a more searching character on the same subject. The Defendant, *Sarah Roupell*, pleaded to the amended bill, that the Plaintiffs had since commenced a suit in equity to determine the validity of that deed, and that consequently, the Plaintiffs could not maintain a suit to perpetuate testimony. That plea was, on argument, disallowed, and was ordered to stand for an answer, with liberty to the Plaintiffs to except (a). The Defendant filed no further answer, and the Plaintiffs having filed exceptions for insufficiency, they now came on for argument.

Mr. *Rolt*, Mr. *Hobhouse* and Mr. *Cotton*, for the Plaintiffs,

(a) See *ante*, p. 307.

Plaintiffs, in support of the exceptions, argued that the Defendant was bound to give the discovery required, in order to settle the points on which issue was to be taken, and that it had always been the practice to require a discovery in bills for perpetuating testimony. That the Defendant having answered must answer fully, and could only protect herself from discovery by plea or demurrer. They also argued, that the new practice as to taking evidence prevailed in the case of a bill to perpetuate testimony; *Knight v. Knight* (a); *King v. Allen* (b); *Bevan v. Carpenter* (c); *Thorpe v. Macauley* (d); *The Earl of Belfast v. Chichester* (e); *Cardale v. Watkins* (f); *Cresset v. Mitton* (g); *Mitford's Pleading* (h); *General Orders of 5th of February, 1861*; 15 & 16 Vict. c. 86.

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Mr. Selwyn and Mr. Swanston, for the Defendant Sarah Roupell, argued, that as the sole object of the bill was to perpetuate the testimony of witnesses, no further discovery could be required than what was necessary to obtain that object. That the Plaintiffs, having got an answer, might file a replication and join issue at once, and that no further discovery could aid them. That a Defendant was only bound to answer that which was material to the relief prayed or the order asked, and might object, by answer, to giving a discovery of anything which was immaterial for that purpose, and that the rule as to answering fully did not apply to immaterial matters; *Lord Dursley v. Fitzhardinge Berkeley* (i); *Scott v. Mackintosh* (k); *Agar v. The Regent's Canal Company* (l); *Redesdale* (m); *Hirst v. Peirse* (n); *Story's*

- (a) 4 Mod. 1.
- (b) Ib. 247.
- (c) 11 Sim. 22
- (d) 5 Mod. 218.
- (e) 2 Jac. & W. 439.
- (f) 5 Mod. 18.
- (g) 1 Ves. jun. 449, and 3

- Bro. C. C. 481.*
- (h) Pages 53, 54 (4th edit.)
- (i) 6 Ves. 251, 263.
- (k) 1 Ves. & B. 504.
- (l) Sir G. Cooper, p. 212.
- (m) Page 306 (4th edit.)
- (n) 4 Price, 339.

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Story's Eq. Pl. (a); Angell v. Angell (b); Moodaly v. Moreton (c); Wyatt's Pr. Reg. (d); Turner's Ch. Pr. (e).

Mr. Cotton, in reply.

The Master of the Rolls.

April 15.

The Defendants have contended, that the Plaintiffs are not entitled to any further or better answer than they have already got. This involves the consideration of matters which, owing to the recent changes made in the practice and procedure of the Court, have in a great measure become obsolete.

The first question to be considered is, whether this is a bill of discovery, in the proper and technical sense of that word? I speak of the technical sense of the word "discovery," because, as Lord *Redesdale* observes in his work on pleading, "Every bill is in reality a bill of discovery, but the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the Defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law till the discovery should be made" (*f*).

The question here is, first, whether this is a bill of discovery in that limited and technical sense of a bill of discovery, as distinguished from other bills, as thus defined by Lord *Redesdale*; and I am of opinion that it is

- (a) *Ch. VII.*
- (b) *1 Sim. & St. 83.*
- (c) *2 Dick. 652.*
- (d) *Page 74.*

- (e) *Vol. 1, pp. 218; 219 (6th edit.)*
- (f) *Mitford, Plead. p. 53 (4th edit.)*

is not a bill of discovery, in this technical sense so defined by Lord *Redesdale*. A bill of discovery proper is filed to aid the jurisdiction of some other Court, and the better to enable the Plaintiff in equity to prosecute or defend such proceedings; and it usually, if not necessarily, states the existence of such proceedings, as the title of the Plaintiff to insist on such discovery. That is not so done in the present case. A bill to perpetuate testimony is treated by Lord *Redesdale* as a separate and distinct species of bill from a bill of discovery, properly so called. Accordingly, in the preceding page of his work (*a*), Lord *Redesdale* observes:—"Original bills not praying relief have been already mentioned to be of two kinds, 1st, bills to perpetuate the testimony of witnesses; and 2ndly, bills of discovery." Here, by the words "bills of discovery," he means bills of discovery properly so called, according to the definition I have already read.

This view of the case is confirmed by Lord *Eldon*, who, in the case of *Lord Dursley v. Fitzhardinge Berkeley* (*b*), expressly states, that a "bill to perpetuate testimony calls for no discovery from the Defendant, but merely prays to secure that testimony which might be had if the circumstances called for it."

Whether the two objects could be united in one bill, and pray the perpetuation of testimony, as to one matter which could not then be made the subject of legal proceedings, and also discovery as to another subject which was the subject of legal proceedings, I express no opinion. Whether any two matters could be so united in substance as to make it possible for one and the same bill to include both subjects in it, it is not necessary for me to decide, or indeed to inquire, for I am satisfied that

(*a*) *Page* 51.

(*b*) 6 *Ves.* 263.

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that this is not the condition of the present bill ; it is one and the same subject-matter respecting which it is sought to perpetuate testimony and to obtain discovery, and as no relief is prayed by it, the discovery, if at all, must be in aid of the jurisdiction of some Court other than the Court of Chancery, and to further the prosecution of some proceeding existing or possibly impending in that Court. If this be correct, and if the subject be the same respecting which both the discovery and the perpetuation of testimony is sought, then the bill is defective, so far as it asks for the perpetuation of testimony, which cannot be afforded if the matter is ripe for decision in any Court, and the evidence could be given there. It follows from hence, that, as collateral to the perpetuation of testimony, the discovery, in the proper sense of that term, is wrong. This is, in truth, a bill to perpetuate testimony and nothing else, and it cannot be converted, at the option of the Plaintiffs, into a bill of discovery, in the sense so defined, as I have already stated, in Lord *Redesdale's* book.

The case of *The Earl of Suffolk v. Green* (a), which was much relied upon in argument before me, does not, in my opinion, contradict or oppose the opinion of Lord *Eldon* and Lord *Redesdale* already cited. That was not properly a suit to perpetuate testimony, it was properly a bill of discovery in aid of proceedings relating to a bond then in force, with a prayer to be at liberty to examine *de bene esse* a witness who was alleged to be very old and infirm.

There is no doubt but that a bill of discovery may ask for the examination of a single witness, one on whom the whole case depends, and may, in so doing, ask to

(a) 1 *Atk.* 450.

to perpetuate his testimony, and also, in like manner, for a commission to examine witnesses abroad ; but it is essential to distinguish between a bill for the perpetuation of testimony, properly so called, and a bill of discovery, in which, as in a bill for relief in this Court, an order may be obtained to examine a witness *de bene esse*, and thus perpetuate the testimony of that particular witness. It is true that in both cases witnesses are or may be examined *de bene esse*, but in a bill to perpetuate testimony, it is because the matter cannot be tried in this or in any Court, and to have the evidence ready for a future time. In a bill of discovery proper, the witness may also be examined in like manner, but this is lest he should happen to die before the time comes for giving his evidence in Court, and then the latter proceeding is in aid of the jurisdiction of some Court other than the Court of Chancery, where proceedings are actually pending or are immediately about to be instituted ; but in a suit to perpetuate testimony, properly so called, as in the case of *Lord Dursley v. Fitzhardinge Berkeley* (a) and in the present case, the existence of such a suit in any Court would be a good ground of demurrer or plea.

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So again, in an ordinary suit for relief in this Court, an order may be obtained to examine an aged and infirm witness *de bene esse*, for fear his evidence should be lost before the time arrives in which he might give it regularly ; but this is quite distinct from the examination of witnesses under a bill to perpetuate testimony, where the evidence is or ought to be sealed up till the time arrives, when, if the witness deposing be dead, the evidence may be used.

I am

(a) 6 Ves. 251.

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The Duke of Portland (a); and *Anon.* (b). It is true that such dismissal does not prejudice the evidence already given; but all this shews, that as soon as the first answer is put on the file, the Plaintiff has, on filing a replication, full power to examine what witnesses he may choose, on the various issues stated in his bill. Unless the right of the Plaintiff to compel an answer were confined to what he seeks by his bill, or, in other words, his right or title to examine witnesses respecting the points stated in the Plaintiff's bill, it is plain that the Court could never draw any line, or tell where to stop the Plaintiff in his examination of the Defendant on interrogatories. Everything, except what consists in an admission or denial of the Plaintiff's right to examine witnesses *in perpetuam rei memoriam*, would be equally material, or, rather, equally immaterial, and the whole birth, parentage, education, and early life of the Defendant might be inquired into by the Plaintiff, and the Court would be able to fix on no principle by which to stop the inquiry or curiosity of the Plaintiff.

It is said that, by the modern practice, the parties themselves can be examined, and that this is a mode of examining the Defendants; but the answer to that is obvious; the proper mode of examining a Defendant as a witness is the same as that of examining all the other witnesses, and as it is only by so examining them that their depositions can be made evidence at a future period, so it is only by examining a Defendant in like manner that his evidence can be perpetuated in common with that of the other witnesses.

Upon the fullest consideration I have been able to give

(a) 6 B. P. C. 39.

(b) 2 Ves. sen. 496.

give to this case, I am of opinion that it would be contrary to the principle of pleading, as laid down by Lord *Redesdale* and Lord *Eldon*, to convert a bill properly filed to perpetuate testimony into a bill for discovery, in the technical sense in which the words are used by Lord *Redesdale*, and that if it be not so converted, and if it be treated as a bill of discovery only, in the general sense of that term in which Lord *Redesdale* observes that "every bill is in reality a bill of discovery," then that the discovery sought is not material to the only order which can be obtained by the Plaintiff in this suit, and that consequently, the answer to these interrogatories, which cannot be read for any legitimate purpose, either in this suit or in any other proceeding, is not material for the purpose of this suit, and cannot be required, and consequently, that these exceptions must be disallowed with costs.

NOTE.—See the 5th & 6th Vict. c. 69, and the statement in 10 Clark & Fin. 305.

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*May 7, 8.*

The Plaintiffs filed a bill to perpetuate testimony as to the validity of a deed, which question, they alleged, could not at present be tried. After the Defendants had, by answer, admitted the Plaintiffs' right to perpetuate the testimony, the Plaintiffs filed another bill, raising the question of the validity of the same deed. A motion, by the Defendants, to stay proceedings in the suit to perpetuate testimony, on the ground of the existence of the second suit, was refused with costs.

**ELLICE v. ROUPELL. (No. 3.)**

**T**HE Plaintiffs filed a bill to perpetuate testimony in regard to the validity of a deed of the 26th of *September*, 1853, which bill the Defendants answered. The Plaintiffs afterwards, in *February*, 1863, filed a second bill in another branch of the Court, in which the question as to the validity of the same deed was also raised.

The Defendant pleaded the second suit in bar of the first, but her plea was overruled (*a*).

Exceptions to the answer were then taken and overruled, and on the next day, the Plaintiffs filed a replication in this suit.

The Defendants now moved to stay all proceedings in this suit with costs, to be paid by the Plaintiffs.

The *Solicitor-General* (Sir *R. Palmer*), Mr. *Selwyn* and Mr. *C. Swanston* in support of the motion. The statement in the first bill, that no proceedings could be taken to try the question, prevented the Defendants demurring to it; *Angell v. Angell* (*b*); but the Plaintiffs have since filed a second bill raising the same question, and which clearly shews that the first suit is unnecessary and useless. Though the Defendants failed, in consequence of mere technicalities, from availing themselves of this objection by plea, those technicalities do not exist on this motion. The two suits which

(*a*) See ante, p. 307.

(*b*) 1 *Sim. & St.* 83.

which raise the same point ought not to be allowed to proceed, for if they do, the same witnesses will be examined twice over, while, if any special necessity exists for their immediate examination, it may take place *de bene esse* in the second suit. As this suit can never be brought to a hearing, the objection cannot, as in an ordinary case, be effectually taken by the answer, and it is, therefore, properly brought forward by motion. The proceedings in this suit ought therefore to be stayed.

As to the costs, the Defendants, who have examined no witness on their own behalf, are clearly entitled to them; *Blinkhorne v. Feast* (a); ————— v. *Andrews* (b).

**Mr. Baggallay, Mr. Hobhouse and Mr. Colton** were not heard.

#### *The Master of the Rolls.*

This case is very singular in its circumstances, but in addition, it seems destined to raise a number of peculiar points of pleading. This motion is, as I said during the argument, in substance, the re-argument of the plea. This was not disputed; but it was said, that upon this motion, the Defendants are relieved from the technicalities to which they were subject in regard to the plea. But it is necessary that some rules of pleading should be preserved; here is a bill for perpetuating testimony, it is not demurred to, but an answer is put in which admits the Plaintiffs' right to examine witnesses *in perpetuam rei memoriam*, and a plea to it is afterwards overruled. Is it open to the Defendants, after they have admitted the Plaintiffs' title to what

(a) 1 *Dick.* 153.

(b) *Barnardiston (C. C.)* 333.

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what they ask by their bill, to come and say, that, by reason of some other proceeding taken by the Plaintiffs in another Court, they are not entitled to what they ask, and that all the proceedings in this suit ought to be stayed? If the Plaintiffs had filed their bill to perpetuate testimony, and it appeared, upon the face of it, that they could at once bring the matter before a Court of law and try the question, the bill would have been open to a demurrer. But if the Defendant does not think fit to demur, but answers the bill, can he afterwards come and stay the proceedings, on the ground that this is a matter which may be at once tried at law? Would not this Court say, if you wished to avail yourself of this defence, you ought to have done so at the proper time by plea or demurrer? Does it make the thing more clear that a suit has since been instituted?

This, which is a distinct question of pleading, is, whether a Defendant, who has admitted the title of the Plaintiffs to this species of order, can afterwards say he was wrong in making the admission, and ask that all the proceedings might be stayed. How can I tell under what circumstances the other bill has been filed?

Take this case, which actually happened: a man who was tenant for life with remainder to his first son in tail, married, first at *Gretna Green*, had a son born, and was afterwards married again at *St. George's, Hanover Square*. On his first son coming of age, he and his father cut off the entail and mortgaged the property to *A. B.*, who, finding that the eldest son was born before the second marriage, filed a bill to perpetuate testimony as to the Scotch marriage, and proceeded to examine his witnesses. Now suppose this had happened: that when the eldest son had examined one-half his witnesses, the father had died, and that the second son claimed

claimed the estate, would not the eldest son have been allowed to proceed in the examination of his witnesses, or would the question be made more clear by the second son's bringing an ejectment to recover the estate? I apprehend that the Court would, in such a case, allow the examination of the witnesses to proceed.

In this case, on a former occasion, I gave directions for the examination in the Registrar's Office of every reported case relating to this subject, but in none of them can such motion as the present be found. I do not say that this is conclusive, but such a case as I have stated must have arisen.

I am of opinion that this motion cannot be sustained.

The Plaintiffs have brought a bill claiming a right to examine witnesses *in perpetuam rei memoriam*, that right has been admitted, and they are entitled to the order peculiar to suits of this nature. I cannot go into circumstances of the other suit, the objects of the two suits not being identical. I must therefore refuse this motion with costs.

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The *Solicitor-General* stated, that it had been agreed that proceedings in this suit should be stayed, on terms which had been arranged between the parties.

May 8.

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## ABSOLOM v. GETHING.

Jan. 15, 16.

The Friendly Societies Act (18 & 19 Vict. c. 63, s. 23) requires the assignees, &c. of the officers of such societies "upon demand in writing" to pay the debts due from such officers in priority of his other creditors:—*Held*, that a bill filed to recover the amount is a sufficient "demand in writing."

The priority over other creditors, which is given to friendly societies for debts due to them from their treasurer, &c. is not lost by their neglecting, for some time, to make him give the security required by their rules and by statute, nor by their neglect to audit his accounts.

**I**N 1840, a friendly society, called "*The Female Benefit Society*," was established under the provisions of the 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, c. 4. At the same time, *William Conway James* was appointed treasurer of this society, and he continued to hold that appointment until the 31st *May*, 1861, when he assigned all his estate and effects to the Defendants for the benefit of his creditors.

On the 19th *June*, 1861, *Mary Absolom* and *Mary Rolands*, as "stewards and trustees" of the society, demanded, in writing, payment to them of the sum of 400*l.* 13*s.* 2*d.*, alleged to be due to the society from *William Conway James*, and they insisted on payment of that sum in priority of his other creditors. This being refused, they filed the present bill in 1862, asking for payment of that sum out of the estate and effects of *William Conway James*, and for an account thereof, if necessary.

They rested their claim for priority on the 23rd sect. of the 18 & 19 Vict. c. 63, which is as follows:—

"If any person appointed or employed to any office in any friendly society, and having in his hands or possession, by virtue of his office, any moneys or property whatsoever of such society," &c., "shall die or become bankrupt or insolvent," &c., "or shall make any assignment, disposition, assignation or other conveyance for the benefit of his creditors, the heirs, executors, administrators or assignees of every such officer," &c.

&c., "shall, upon demand in writing made by the treasurer, or by the trustee, or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such moneys," &c., "to such person as such treasurer or trustees shall appoint, and shall pay, out of the estate, assets or effects, heritable or moveable, of such officer, all sums of money due which such officer shall have received, before any other of his debts are paid and before any other claims upon him shall be satisfied."

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v.
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The defences raised by the Defendants were as follows:—First, that the Plaintiffs were not the trustees of the society. As to this, it appeared that the rules did not provide for the appointment of trustees, but that six days before the filing of the bill, the Plaintiffs, who were then stewards only of the society, had been appointed trustees.

Secondly, it was said, that there had been no valid demand in writing "by the treasurer or by the trustees," or by "any person appointed at some meeting of the society to make such demand." For although the Plaintiffs, by their notice of the 19th of June, 1861, had claimed as "stewards and trustees," still that they did not then fill the character of trustees.

Thirdly, that although the rules of the society required it, *William Conway James* had not, until the 7th of January, 1853, given any bond in the form prescribed by the 10 Geo. 4, c. 56, s. 11, and which that section required him to do, before he "should be admitted to take upon himself" the execution of the office of treasurer. That therefore he had not, until that time, been duly appointed treasurer.

v 2

Fourthly,

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 v.
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Fourthly, that *William Conway James* had drawn the money in question out of the savings bank with the assent of the secretary, who had verbally sanctioned his taking the money, on the terms of his paying interest thereon, and that therefore it was a loan to *James* and not a fund held by him as treasurer. But this statement the Court considered disproved.

Fifthly, that the society had omitted to audit *William Conway James'* accounts, and had therefore not taken proper steps to prevent his dealing improperly with the funds, and that by their laches they had deprived themselves of their priority.

Mr. *Hobhouse* and Mr. *Jessel*, for the Plaintiffs, relied on the express terms of the 18 & 19 Vict. c. 63, s. 23.

Mr. *Baggallay* and Mr. *Gordon Whitbread*, in support of the fourth objection, cited *Ex parte The Amicable Society of Lancaster* (a); *Ex parte Ross* (b); *Ex parte Fleet* (c); and see *In the Matter of the Heanor Friendly Society* (d).

They argued that the clause in question, giving priority to friendly societies over other *bona fide* creditors was harsh and inequitable and that it ought to be construed with the greatest strictness.

The MASTER of the ROLLS.

I think the Plaintiffs are entitled to a decree, and that what is alleged by the Defendants is not sufficient to

(a) 6 Ves. 98.
 (b) 6 Ves. 802.

(c) 4 De G. & Sm. 52.
 (d) 1 Beav. 508.

to deprive them of their rights. Assuming that 400*l.* 13*s.* 2*d.* was due from *William Conway James*, at the time when he became insolvent and executed the deed of assignment of the 31st of *May*, 1861, it is said that the Plaintiffs are not entitled to the benefit of the 23rd section of the 18 & 19 *Vict.* c. 63, for these reasons:—

In the first place it is said there are no trustees of the society. This defence fails, the fact being that a document appointing them trustees previous to the filing of this bill has been produced.

In the next place, it is said, that no demand in writing has been made. I do not go into the question whether any such demand was made previous to the filing of this bill, but of this I am satisfied, that the bill itself is a demand in writing, and there is therefore no necessity to go beyond that.

Next, it is said, that the treasurer did not give any security until *January*, 1853 ; but he might be treasurer before he gave security, although he could not properly act and his acts might be inofficious. However he gave security in 1853, and I am of opinion that from that time to 1861, he was the treasurer of this society.

It is then said, that this money was in his hands, not in his character of treasurer, but as borrower. The evidence on that fails. When he took this money out of the savings bank he committed a breach of duty, and there is nothing in the statute to the effect, that any misconduct of the treasurer can deprive a friendly society of the benefit of this clause of the act. This clause assumes the fact that the treasurer has acted improperly ; if he had allowed the investment to remain in the savings bank, it would not have been necessary to come against his estate.

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The legislature has thought fit, in these cases, where a number of poor persons have made a provision against sickness or the like, that they shall have the benefit of the priority given by this clause, and everyone dealing with the treasurer of a friendly society knows that this is the law, and that his estate is mortgaged to the full amount for what he may owe to the society, in priority over every other claimant. I do not therefore feel the extreme iniquity of this clause, which the Defendants have attempted to impress on me; and though I admit that this clause must be construed strictly, still I have been unable to come to the conclusion that Plaintiffs are not entitled to the benefit of it.

It is then said, that the society has not audited the accounts, and that it has been satisfied with the statement of the treasurer. But I do not see that they have thereby lost the benefit of the clause.

All the objections fail, and, the Defendants admitting sufficient assets, the Plaintiffs are entitled to a decree for the sum claimed, which, by the treasurer's account, appears to be the amount due from him.

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1863.

## FARMER v. DEAN.

THE testator died in 1861. By his will, he devised his freeholds and copyholds to the Plaintiff (his son), *James Farmer* and *E. H. Dean*, upon trust to sell and hold one-third of the purchase-money for his daughter *Sarah Griffiths* for life, with remainder to her children, another one-third for his daughter *Ann Dean* absolutely, and the remaining one-third for the Plaintiff absolutely. The testator appointed *Dean* and the Plaintiff executors.

The trustees put part of the trust property, called the *Brickhouse Estate*, up for sale by auction in *June, 1862*. It was not sold, but was bought in for *3,150l.* The trustees could not afterwards obtain a purchaser at that price.

The Plaintiff being willing to give *3,150l.* for the property, filed this bill against his co-trustee and against *Ann Dean* and her husband, and *Sarah Griffiths* and her husband and their three infant children, praying that he might be at liberty to purchase the *Brickhouse Estate*. It appeared that it would be for the benefit of all parties interested that the Plaintiff should become the purchaser at that price.

*Mr. W. Morris* for the Plaintiff(a).

*Mr. Babington* for the Defendants.

*Feb. 10, 11.*  
After an ineffectual attempt to sell by auction an estate devised in trust for sale, liberty was given to one of the trustees to purchase it at the price at which it had been bought in, upon its appearing beneficial to the parties interested.

*The*

(a) See *Campbell v. Walker*, 5 Ves. 681.

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*The Master of the Rolls.*

I have looked into this matter, and I think that the Plaintiff may take a decree giving him liberty to purchase.

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## ABSTRACT OF DECREE.

Let the Plaintiff be at liberty to purchase the *Brickhouse Estate* for 3,150*l.* Order the trustees to convey and the Plaintiff to pay the costs of suit. *Reg. Lib. 1863, A., fol. 236.*

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1862.

Dec. 10, 11,  
12, 17.

A covenant not to carry on the trade of horse-hair manufacturer within 200 miles of *Birmingham*, held valid.

A covenant, on the purchase of the business of horse-hair manufacturers not to carry on the trade of horse-hair manufacturer, construed to prevent the covenantor from the buying and selling manufactured horse-hair.

**HARMS v. PARSONS.**

**I**N August, 1858, the Plaintiffs (*Harms* and *List*), who carried on the trade of horse-hair manufacturers, in *London*, agreed with the Defendant (*Parsons*), who carried on the same business in *Birmingham*, to buy the goodwill of the Defendant's business of "horse-hair manufacturer" for 630*l.*, and the stock at a valuation.

By a deed dated the 28th of *February*, 1859, and made between the Plaintiffs, described as *horse-hair manufacturers*, of the one part and the Defendant of the other part, after reciting that the Defendant had agreed to sell to the Plaintiffs "all his interest and goodwill" in the trade of *horse-hair manufacturer*, it was witnessed, that the Defendant assigned to the Plaintiffs "all and singular the beneficial interest and goodwill of him, the Defendant, in the said trade or business of a *horse-hair manufacturer*," and all implements, &c., and all right, title, &c.

The

The Defendant thereby covenanted with the Plaintiffs as follows:—

"That he, *Joseph Parsons*, shall not, nor will, at any time hereafter, either by himself or in connection or by any other person or persons, directly or indirectly *carry on the said trade or business of a horse-hair manufacturer*, at any town, city or other place in the United Kingdom, *within the distance of 200 miles from the town of Birmingham*, without the consent in writing of the Plaintiffs, from time to time, first had and obtained, except for their benefit and at their request, under a penalty of 1,000*l.* to be paid to the Plaintiffs, their executors, administrators and assigns. Provided always, that nothing herein contained shall extend or be construed to prevent *Joseph Parsons* buying and selling Mexican fibre, as a wholesale dealer, but he shall not, either directly or indirectly, be at liberty hereafter to manufacture the same."

The Plaintiffs alleged that the Defendant had violated this covenant, and they filed this bill for an injunction to restrain the Defendant from carrying on the trade or business of a horse-hair manufacturer *and dealer at Birmingham*, or within 200 miles thereof.

The Defendant admitted he had bought and sold hair, and he insisted on his right to act as a dealer, as distinguished from a manufacturer of horse-hair. He said as follows:—

"I say and insist, that buying and selling hair is no part of the business of a hair manufacturer, and that my trade at *Birmingham*, which was bought by the Plaintiffs, was that of a horse-hair manufacturer only, and not of a dealer in the raw material. The business of buying and selling hair is a distinct business from that

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^a

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that of a hair manufacturer, and is followed by persons who are not manufacturers."

Mr. *Baggallay*, Mr. *E. K. Karlake* and Mr. *F. Clifford*, for the Plaintiffs, argued that the covenant was valid in law, that the Defendant had violated it by buying and selling horse-hair, and that this was part of the business of horse-hair manufacture which the Plaintiffs had purchased from the Defendant. They cited *Bunn v. Guy* (a); *Whittaker v. Howe* (b); *Wallis v. Day* (c); *Tallis v. Tallis* (d); *Avery v. Langford* (e).

[*The MASTER of the ROLLS* referred to *Benwell v. Inns* (f).]

Mr. *Selwyn* and Mr. *Druce*, for the Defendant, argued, that 200 miles was an unreasonable limit; that the covenant was in restraint of trade, and was void. Secondly, they argued that the covenant had not been violated, for the two trades were distinct, and that the Defendant had only acted as a dealer and not as a manufacturer. They cited *Horner v. Graves* (g); *Price v. Green* (h); *Mallan v. May* (i).

Mr. *Baggallay* in reply.

The MASTER of the ROLLS.

Dec. 17.

The Plaintiffs insist that the Defendant has broken the covenant; this he denies, and, in the first place, says,

- (a) 4 *East*, 190.
- (b) 3 *Beav.* 383.
- (c) 2 *Mee. & W.* 273.
- (d) 1 *Ellis & Bl.* 391.
- (e) *Kay*, 666.

- (f) 24 *Beav.* 307.
- (g) 7 *Bing.* 735.
- (h) 16 *Mee. & W.* 346.
- (i) 11 *Mee. & W.* 653.

says, that the covenant is worth nothing, because it is in restraint of trade, and prohibits the Defendant from carrying it on in any part of *England* or *Wales*, except in a corner of *Cornwall*, and also in part of *Scotland* and *Ireland*. I do not assent to that view of the question; and on reading the cases, I do not think that this covenant is bad by reason of its extent. The cases lay down this principle:—that if the nature of the trade require it, the extent excluded may be very great indeed, as in the case of a solicitor and attorney, in which there are two cases which hold that such a covenant is good, though it prohibits the business being carried on throughout all *England*.

This covenant is not an absolute prohibition, it would allow the Defendant to carry on his business in *Glasgow*, and the trade seems confined to a very small number of persons. I am therefore of opinion, that the area of exception is not so excessive as to vitiate the covenant.

The next question is, whether the Defendant has broken the covenant? This is a question of fact, and as to this, the Defendant draws a distinction between a horse-hair manufacturer and a horse-hair dealer, and I think that this is clearly established by the evidence. The Defendant also points out, that it is only the trade of horse-hair manufacturer, not that of dealer, which he has sold. I assent to the distinction between the two branches of trade, and the evidence establishes, that the Defendant has done nothing as a horse-hair manufacturer, but there is distinct evidence of the Defendant having bought and sold manufactured horse-hair; indeed, to some extent he admits it in his answer. I am satisfied, on the evidence, that buying and selling manufactured horse-hair is part of the business of a horse-hair manufacturer, and that the trade of horse-hair dealer is not confined

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confined to unmanufactured horse-hair. The sale is of the business of a horse-hair manufacturer, that is, of the whole of such a business; and when I look at the assignment, which must be construed most strongly against the grantor or vendor, I find that the Defendant has sold his business of horse-hair manufacturer and all that belongs to it, which must be held to mean, every thing which properly belongs to such a business, and therefore to include the selling of manufactured horse-hair.

The consequence is, that when the Defendant covenants that he will not "carry on the trade or business of a horse-hair manufacturer," he has covenanted to the extent of the business he has sold, that is, that he will not sell manufactured horse-hair.

The result is, that I must grant an injunction, to restrain the Defendant from buying and selling manufactured horse-hair, either directly or indirectly, within the 200 miles, and from or otherwise interfering with the trade of horse-hair manufacture.

With respect to the other point, I must dismiss the bill, so far as it seeks to restrain the Defendant from carrying on the trade or business of horse-hair dealer, as distinct from the purchase and sale of manufactured horse-hair.

I shall give no costs on either side. The Plaintiffs have put their case too high.

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**HARRIS v. HARRIS. (No. 3.)**

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July 16.

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**I**N 1848, on the marriage of Mr. and Mrs. *Harris*, a considerable sum of money and some copyholds, which were held on a lease for three lives, were settled on trusts, which gave a large portion of the income to Mrs. *Harris* for her separate use for life, and the remainder of the income to Mr. *Harris* for life, and after their deaths, the property was settled on the children of the marriage. There was no trust for renewal. In 1850, two of the *cestuis que vie* had died, and the other (*John Hill*) was of an advanced age. The trustees thereupon renewed the lease by the addition of two lives, at an expense of 900*l.*, of which, the sum of 403*l.* was, by the Chief Clerk's certificate, found to have been paid by Mr. *Harris*. It was arranged by a deed of 1853, which however was inoperative as to Mrs. *Harris* and the children, that the 403*l.* should be taken in satisfaction of so much of the trust funds as had been improperly paid to Mr. *Harris*.

This cause now came on for further consideration, and Mr. *Harris* asked to be paid or allowed the sum of 403*l.* out of the other trust funds. *John Hill* the original *cestui que vie* was still living.

Mr. *Lloyd* and Mr. *Beavan*, for Mrs. *Harris*, argued that Mr. *Harris*, the tenant for life, had no right to be repaid the 403*l.* which he had voluntarily advanced. That Mr. *Harris* was clearly bound to pay some portion of it, and that his proportion could only be ascertained at his death, when the extent of his enjoyment would be

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v.

HARRIS.  
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be known. That it was consequently premature to ask for repayment.

Mr. Selwyn and Mr. Salmon, for the children, also argued that the whole fine ought to be borne by the tenant for life and the remaindermen in proportion to their interest. They cited *Carter v. Sebright* (a); *Jones v. Jones* (b); *Hudleston v. Whelpdale* (c).

Mr. Follett and Mr. Lonsdale, for Mr. Harris, argued that there being no trust to renew and no obligation on the part of the tenant for life to renew, he was entitled to be paid the 403*l.* advanced by him for that purpose out of the trust funds in Court. They cited *White v. White* (d).

*The Master of the Rolls* was of opinion that Mr. Harris could not now require the repayment of the 403*l.* which he had advanced voluntarily for the purpose of renewal, and he thought that the question of how the renewal fine ought to be borne, as between parties entitled, must remain undecided until after the death of tenant for life, when the amount to be borne by him could be properly ascertained.

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Feb. 21.

The decree on further consideration declared "that Mr. Harris was not entitled, during his life, to make any claim in respect of the 403*l.*, advanced by him for the purposes and under the circumstances in the Chief Clerk's certificate mentioned, but that after the death of

(a) 26 Beav. 374.  
(b) 5 Hare, 440.(c) 9 Hare, 775.  
(d) 9 Ves. 554.

of the last-named Defendant, any of the persons interested in respect of the said sum of 403*l.*, or in the trust premises comprised in the settlement, were to be at liberty to apply, as they might be advised, as to the sum or sums of money to be paid to or by the estate of Mr. *Harris*, for or on account of the sum of 403*l.*, or for or on account of the moneys paid out of the *corpus* of the trust premises comprised in the settlement, in or about the renewal or renewals of the life or lives for which the copyhold estates in the certificate mentioned are held."

Mr. *Harris* died in *December*, 1862, and *John Hill*, the last of the three original *cestuis que vie*, died in *January* following, so that Mr. *Harris* had received no benefit from the renewal.

The executors of Mr. *Harris* now presented a petition for the payment to them of the 403*l.* out of the trust funds in Court. It appeared, by the evidence in the cause, that from the marriage in 1848 until the year 1854 Mr. and Mrs. *Harris* had lived together, and that Mr. *Harris* had received his wife's separate income, but that they had since lived separate.

Mr. *Baggallay* and Mr. *Lonsdale*, in support of the petition, argued, that as Mr. *John Hill* one of the original *cestuis que vie* had survived Mr. *Harris*, and as Mr. *Harris* had derived no benefit from the renewal in 1850, his estate was entitled to be repaid the 403*l.* out of the capital of the settled property now in Court.

Mr. *Lloyd* and Mr. *Beavan*, for Mrs. *Harris*, argued, that the 403*l.* must be considered as having been paid out of the separate income of his wife, which her husband was in receipt of at the time of renewal.

Mr.

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Mr. *Selwyn* and Mr. *Druce*, for the children, opposed the petition. They cited *Carter v. Sebright* (a).

Mr. *Parke* for the trustees.

*The Master of the Rolls.*

I am of opinion that the executors of the tenant for life are entitled to the whole 403*l.* As the certificate finds that it was paid by Mr. *Harris*, I must treat it as paid out of his own pocket. If an application had been made to the Court to effect a renewal of the lease, the question would have been, out of what fund the fine ought to be paid, and I think it would have been paid out of the fund in Court, which would have diminished the income of the tenant for life to the extent of the interest on the amount paid for the renewal. The tenant for life by paying the amount has lost the interest thereon. In that view of the case, therefore, Mr. *Harris* would be entitled to be repaid.

If the Court adopt the principle of apportioning the fine between the persons entitled, according to their enjoyment, then Mr. *Harris* has received no benefit at all from the renewal. I am therefore of opinion Mr. *Harris'* estate is entitled to have 403*l.* paid to him out of the funds in Court.

(a) 26 *Beav.* 374.

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## COOPER v. JENKINS.

Feb. 10, 11.

THE Plaintiff *Cooper* was entitled, during the life of his wife, to some property designated as lots 1 and 2. The Defendant, *W. P. Jenkins*, was entitled to an interest in reversion in the same property.

By an indenture dated the 19th of *March, 1822*, *W. P. Jenkins*, and *Cooper* as his surety, mortgaged lot 2 for 250*l.* and interest, but *W. P. Jenkins* alone received the money and alone covenanted to pay it.

By a contemporaneous deed, dated the 19th of *March, 1822*, *W. P. Jenkins* conveyed his interest in lot 1 to a trustee, upon trust to save harmless and keep indemnified *Cooper*, and his estate in lot 2, from and against the payment of the sum of 250*l.* and the interest thereof; and for that purpose, in case *Cooper*, or his life estate, should become liable to pay or make good, and should actually pay or make good, any sum or sums of money on account or in respect of the 250*l.* or the interest thereof, then, upon trust, out of the rents and profits of lot 1, or by mortgage, sale or other disposition thereof, to raise and repay to *Cooper* such sum or sums, with interest thereof after the rate of 5*l.* per cent. per annum.

*Cooper* paid the interest on the mortgage from 1822, amounting to 420*l.*, and the interest on the sums so paid by him amounted to 456*l.*

In 1855, 100*l.* (being the produce of part of lot 2,  
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v.

Jenkins.

sold to a railway company) was applied in part discharge of the 250*l.*

Mrs. *Cooper* died in 1856, and Mr. *Cooper's* life estate thereupon ceased.

The property had been sold, and lot 1 had produced 400*l.*, and lot 2 had produced 991*l.* Out of the latter sum, the amount remaining due on the mortgage (171*l.*) was paid, under an order made in 1862 in other suits.

This bill, filed by *Cooper* in *May*, 1862, prayed the execution of the trusts of the indemnity deed of the 19th of *March*, 1822, and that the 400*l.* (the produce of lot 1) might be applied for the Plaintiff's indemnity, and that the deficiency of that sum might be paid out of *Jenkins'* share in the 991*l.*, the produce of lot 2.

The question argued was, whether the produce of lot 2 (the mortgaged property) was applicable to the Plaintiff's indemnity.

Mr. *Hobhouse* and Mr. *Kay*, for the Plaintiff, argued, that as the produce of lot 1 was insufficient to indemnify the Plaintiff, he was entitled to stand in the place of the mortgagee of *Jenkins'* interest on the produce of lot 2 for the remainder. They argued, that a surety was entitled to the benefit of all the securities held by the creditor whom he paid off. They relied on the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5, by which a surety is entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security held by the creditor, whether it shall or not be deemed, at law, to have been satisfied by the payment of the debt, and he may sue at law or in equity.

Mr.

Mr. *Lloyd* for Mr. *Jenkins*, and Mr. *Baggallay* and Mr. *Rodwell* for other parties interested in the produce of the estate, were not heard.

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*The MASTER of the ROLLS.*

The Plaintiff proceeds on the deed of indemnity, which provides, that if he should be compelled to pay (which could only be by the mortgagee's taking possession of the land), or if he should actually pay the interest, or any part of it, he shall be entitled to be repaid, with interest at 5*l.* per cent., out of lot 1. He has thought fit to take that indemnity, which he considers more profitable than his claim as surety on the mortgaged property. As he has paid off the interest on the mortgage, he is entitled to enforce the deed of indemnity against *William Perkins Jenkins*. But I do not, at present, think, that the Plaintiff has any right to indemnity out of lot 2.

*The MASTER of the ROLLS.*

My opinion remains the same as I expressed yesterday. The Plaintiff cannot have the benefit of the mortgage on the principle of the Mercantile Law Amendment Act. He must proceed under one or other of the two rights which he claims. If he had bound himself to pay the mortgagee, and had done so, he would then have been entitled to the benefit of the mortgage. He has not done so, he has bargained, by a separate instrument, for an indemnity which is perfectly distinct. This payment of interest was perfectly voluntary, but that does not affect the deed of indemnity, which is precise, and entitles him to what he has paid, whether he was compelled to pay or not. If

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a surety pay off the mortgage he is entitled to the benefit of all the securities. But here, the Plaintiff has contracted with the mortgagor, for whom he is surety, that he should receive a particular species of indemnity, if he pay off any part of the principal or interest of the mortgage. That indemnity he is entitled to, and not to the benefit of the mortgage paid off.

All I can do in this suit is, to make a decree for the enforcement of the indemnity deed.

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### WELD v. THE SOUTH WESTERN RAILWAY COMPANY.

1862.

Feb. 13, 14.

An existing railway company was authorized by an act to make some extensions and new works on their line, and "for the purposes of the works by the act authorized and the general purposes of their undertaking," the company might raise, by the creation of new shares, any sum not exceeding 100,000*l.*

**I**N 1859, this company, which had long been incorporated, and had, by previous acts, been authorised to raise, by stock and shares (exclusive of debenture stock) moneys to the extent of about 8,000,000*l.*, obtained a further act enabling them to make new works and raise further funds.

By this act (22 & 23 Vict. c. xliv), after reciting, that, for the purpose of affording better railway accommodation, it was expedient that the company should be authorised to make and maintain a new line of railway (called the *Kingston Bridge Line*) commencing by a junction with the *Windsor Railway* and terminating near the foot of *Kingston Bridge*, and after reciting the expediency

The Lands Clauses Consolidation Act, 1845, was incorporated in the special act, "save so far as the clauses and provisions thereof respectively were expressly varied or excepted by this act." Held, that the 16th section of the Lands Clauses Act (8 & 9 Vict. c. 18) which requires the whole capital to be subscribed before the compulsory powers of taking land is put in force, was inapplicable to the new act.

expediency of making a great variety of other new works, it enacted as follows :—

“VIII. The Lands Clauses Consolidation Act, 1845 (*a*), and the Railways Clauses Consolidation Act, 1845, save so far as the clauses and provisions thereof respectively are expressly varied or excepted by this act, are incorporated with this act.”

It then authorised the making of the several works, including the “*Kingston Bridge Line*,” and the taking, compulsorily, of the necessary lands specified in the deposited plans, with certain limits of deviation.

The 34th section was as follows :—

“XXXIV. For the purposes of the works by this act athonised and the general purposes of their undertaking, the company, from time to time, may raise, by the creation and issue of new shares, any sum not exceeding 100,000*l.*”

In *May*, 1861, the company gave the Plaintiff notice of their intention of taking certain parts of his lands.

The Plaintiff resisted this, and the company thereupon gave him the usual bond for 250*l.*, and they deposited that sum, being the amount of the valuation of the land, in Court.

The Plaintiff filed this bill against the company to restrain them taking his land, on the ground (amongst others), that they had not complied with the 16th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 16), which requires, that before it shall be lawful for the company to put in force the compulsory powers of taking land, “the whole of the capital or estimated sum for defraying the expenses of the undertaking

(*a*) 8 & 9 Vict. c. 18.

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 COMPANY.

taking shall be subscribed under contract binding the parties thereto," &c.

The Plaintiff gave the company notice to produce a certificate of two justices, under the 17th section, of their compliance with the requisitions of the 16th section, but they were unable to produce any.

The Defendants by their answer said as follows:—

" We submit that, according to the true construction of the said *London* and South Western Railway Act, 1859, we were not at any time, and are not, bound to procure any such certificate as is required by the clause or section numbered 17 of the Lands Clauses Consolidation Act, 1845, in cases where such section applies; and we admit that we have not procured such certificate; and we are advised and we humbly insist and submit, that the clause or section 16 of the Lands Clauses Consolidation Act, 1845, is inapplicable to and inconsistent with the said *London* and South Western Railway Act, 1859, in this behalf. And we say, that for the reasons and under the circumstances aforesaid, it is the fact, that we have not procured the certificate aforesaid. Previously to entering upon the Plaintiff's lands, we had, under powers duly enabling us in that behalf, created and issued preferential stock, for the purposes of the works by the said *London* and South Western Railway Act, 1859, authorised, and for the general purposes of our undertaking, to the amount of 764,252*l.*, the whole of which sum has been actually paid up, of which sum a part, being the balance of 100,000*l.* not already applied by us for the purposes of the said *London* and South Western Railway Act, 1859, is applicable to and is intended to be applied, by us, in carrying out the works by the same act authorised and not already carried out. And we say, that under the circumstances aforesaid,

aforesaid, it is the fact that no new shares in the said railway company to the amount of 100,000*l.*, or to any other amount, have been created and issued by us."

It appeared also, that by a subsequent act (23 & 24 Vict. c. clxxxv), the company had obtained powers to make further works, and to raise 400,000*l.* "for the general purposes of the company," and special powers as to the preferential and other stock and shares.

Mr. Baggallay and *Mr. Schomberg*, for the Plaintiff. Before the Defendants took the Plaintiff's land, they were bound to shew that the whole capital had been subscribed, and it is admitted, that it has not been. The company have raised preferential stock, but they could only raise it under this act, or by "the creation and issue of new shares." The company, therefore, have not obtained a right of compulsorily taking the Plaintiff's property.

Mr. Selwyn and *Mr. C. Roupell* for the company. The 16th section of the Lands Clauses Act is inapplicable to a case, where an extension line of railway is to be made by an existing company, by means of funds to be raised by new shares in such company. It is confined to cases where the undertaking is intended to be carried into effect by means of a capital to be subscribed for by the promoters of the undertaking; *The Queen v. The Great Western Railway Company* (a). Here the further capital is to be raised for the general purposes of the undertaking of the company. The Lands Clauses Act is in this respect inconsistent with the special act, and must be considered as "expressly varied" thereby and therefore inapplicable.

Mr.

(a) 1 *Ell. & Bl.* 253.

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Mr. *Baggallay* in reply. The case cited differs from the present in the terms of the exception.

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*The Master of the Rolls.*

It is impossible to say that the 16th section of the Lands Clauses Consolidation Act applies to a case like the present. The clause was obviously intended to prevent mere bubble schemes from being set on foot, and to provide an ample security to the public that their land should not be taken and persons disturbed without a reasonable certainty of the undertaking being carried into effect. The reason, therefore, for the enactment does not apply to the case of an old established company and one which has ample funds for the purpose. Originally this question might have been one of difficulty, but I am of opinion that *The Queen v. The Great Western Railway Company* (a) really decides the case. That it decides the question in all cases where the Lands Clauses Consolidation Act is incorporated with the special act by such words as are used in that case, viz., so far as they "are applicable to and not inconsistent with its provisions," must be admitted. It is a solemn decision of the Court of Queen's Bench in Banc by very eminent Judges, who shew, not only the reason why the section does not apply, but also that the words of the enactment are inapplicable. That decision has never been contested from that time to the present.

The difference between that case and this is simply this:—that, in the present case, the Lands Clauses Consolidation Act is re-enacted and united with the special act,

act, "save so far as the clauses and provisions thereof are expressly varied or excepted by this act." That is the only difference. I do not consider that to make a distinction between the two cases. In my opinion, where the Lands Clauses Act is not applicable to and inconsistent with the special act, it is expressly varied by the act. No consideration that I have been able to give to the words of that case in the Queen's Bench and of this case, appear in any reasonable or just sense to make a distinction between them. In *The Queen v. The Great Western Railway Company* the Lands Clauses Consolidation Act was incorporated with the special act, except where it was not applicable and not consistent with the act of that company; in all those cases, then, it must be varied by the act. It is not necessary to say in express terms that it shall be varied; it is not necessary to say "we alter this clause or vary it in this respect;" but it is varied, in substance and in spirit, in every case in which it is inconsistent with and not applicable to the particular act of the railway company.

I am of opinion, with respect to the words "save so far as the clauses and provisions thereof are expressly varied or excepted by this act," that the word "expressly" does not mean in express terms, as by saying "this particular section of the act is varied," because if that were so, there is no section that is in express words varied; but it is only varied in this respect:—where it is not applicable to the particular clauses of the special act. I am therefore of opinion that *The Queen v. The Great Western Railway Company* governs the present case, and that the 16th section of the Lands Clauses Consolidation Act does not apply.

The bill must be dismissed with costs.

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v.  
THE SOUTH  
WESTERN  
RAILWAY  
COMPANY.

1863.

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22.

The tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will: —*Held*, that the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but that he was not entitled either to an indemnity against the charge or to compensation.

**T**HE moiety of the *Eastgate Farm*, held for lives of the see of *Durham*, was vested in trustees for the Earl of *Scarborough* for life, with remainder to his first and other sons in tail, with remainder to the Earl in fee. The trustees were empowered, "at the request and by the direction of" the tenant for life, to sell the property. The property was, together with the other *Savile* estates (which produced an income of more than 20,000*l.* a year), subject to a charge of 15,000*l.* to be raised for the benefit of the Earl's sisters.

In *April*, 1855, the Plaintiff (as he alleged), contracted with the Earl of *Scarborough*, by a correspondence with his solicitor, for the purchase of the Earl's moiety of the *Eastgate Farm* for 4,350*l.*

The Earl of *Scarborough* died in *October*, 1856, without having been married, having devised all his estates (including the *Eastgate Farm*) to trustees for *Henry Savile* for life, with remainders over. The trustees had a power of sale of the devised estates.

After long negotiations, this bill was filed in *April*, 1862, against *Kinnaird* (the trustee of the Earl's will), and against *Henry Savile*, the tenant for life, for the specific performance of the contract, or, in default, for damages.

Mr. *Selwyn* and Mr. *M. A. Shee*, for the Plaintiff, argued that there was a clear written contract, and they asked

asked for its specific performance, with an indemnity against the charge of 15,000*l.* or for compensation. But if that relief could not be given, they then asked for a reference as to damages under Sir *Hugh Cairn's* Act (21 & 22 Vict. c. 27).

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BAINBRIDGE  
v.  
KINNAIRD.

Mr. *Baggallay* and Mr. *Chapman Barber*, for *Kinnaird*, argued, first, that no binding contract had been entered into which could have been enforced against the Earl in his lifetime or against the trustees; *Thomas v. Dering* (*a*) ; *Graham v. Olive* (*b*) ; and that it could not now be enforced. That the Court could not give the purchaser an indemnity against the charge or a compensation unless it had been contracted for; *Balmano v. Lumley* (*c*) ; *Aylett v. Ashton* (*d*) ; *Paton v. Brebner* (*e*). That the utmost relief would be, to direct a conveyance by the devisee in trust, without any compensation or indemnity.

Mr. *Haynes*, for the tenant for life, as to the Plaintiff's right to damages, cited *Sikes v. Wild* (*f*) ; *Walker v. Moore* (*g*) ; *Sugden's Vendors* (*h*).

Mr. *Shee*, in reply, said the Plaintiff, if compelled, was willing to take a conveyance of such estate as he could get from the Defendants.

### *The Master of the Rolls.*

If the Plaintiff will give up the indemnity I am of opinion that he is entitled to a conveyance. I will look into

(*a*) 1 *Keen*, 729.

(*b*) 3 *Beav.* 124.

(*c*) 1 *Ves. & B.* 225.

(*d*) 1 *Myl. & Cr.* 105.

(*e*) 1 *Bli. (O. S.)* p. 66.

(*f*) 1 *Best & Smith (Q. B.)*, 587.

(*g*) 10 *Burn. & C.* 416.

(*h*) *Page* 358 (14th edit.)

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into the question of indemnity, but I think it is not a case for compensation. A perfectly good contract is constituted by the letters, which bound the Earl of *Scarborough* and his estate, and consequently, the Plaintiff, being willing to take the property, is entitled to a specific performance of it, and to a conveyance from Mr. Kinnaird of all that he can convey as devisee in trust. I will consider the question of indemnity.

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### *The Master of the Rolls.*

April 22.

I can only give the Plaintiff a simple decree for specific performance, I cannot compel the Defendants to enter into any indemnity, for the cases cited are conclusive. It is clear that the trustee and the legal personal representatives cannot stand in any worse situation than the Earl of *Scarborough*, and if he were living and had received the whole purchase-money, I could not have compelled him to give an indemnity, and I cannot, therefore, make his trustee and the tenant for life give any.

I will make a decree for the specific performance of the contract, and direct a conveyance to be settled in Chambers, if the parties differ, and the Plaintiff must have his costs. However, in settling the conveyance I shall not require the Defendant to give any indemnity or compensation. My impression is, that the Plaintiff will get a safe title and that the 15,000*l.* will never be raised out of this property.

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1863.  
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COATES v. HART.

March 14.

THE testator directed his estate, property and effects to be converted and invested in the funds, "and when and as" *Georgiana Legge, Emma Legge, John F. Pott* and *Frederick Pott* severally attained their respective ages of twenty-one, he gave to each of them one-fourth of the interest of such funds, for their several lives. He proceeded thus:—

"And in case it shall happen, that either of them the said *Georgiana Legge* and *Emma Legge, John F. Pott* and *Frederick W. Pott* shall happen to die under the age of twenty-one, and without leaving lawful issue, then I give and bequeath the interest and dividends to which such deceased legatee was entitled to the survivors or survivor of them, for her, his and their several and respective lives, to be paid to her, him and them in manner aforesaid. And from and after the decease of either of the said four legatees, leaving lawful issue her or him surviving, then I give and bequeath the principal money in the said stocks or funds, to the interest whereof such deceased legatee had been entitled in her or his lifetime, unto, amongst and between such issue, in equal shares and proportions, share and share alike, if more than one, and if but one, then to such only child, for his or her absolute use and benefit. And I also give to such issue the share and interest of the principal money to the interest whereof their deceased parent would have been entitled in case he or she had lived

A testator gave to each of four persons, when and as they respectively attained twenty-one, one-fourth of his residue for life, and in case either of them "should happen to die under the age of twenty-one years and without leaving lawful issue," then he gave his share to the survivors for life. And from and after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue. And if all four legatees should die without leaving lawful issue, there was a gift over. One of the legatees attained twenty-one and died with-

out issue:—*Held*, that her share was undisposed of, the Court being of opinion that "and" could not be read "or."

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lived to survive any other of the said four legatees who shall afterwards die without issue."

"And in case it should happen that *all* the said four legatees *Georgiana Legge, Emma Legge, John F. Pott* and *F. William Pott* the younger shall *die without either of them leaving lawful issue*, then I give and bequeath the whole of my said residuary estate and property to *Emma Coates* and *Frederick William Pott* the elder in equal shares."

The events which happened were as follows:—

The testator died in 1830, and *Emma Legge* died in his lifetime, an infant and unmarried.

Georgiana Legge attained twenty-one in 1840, she married and afterwards died in 1862, without leaving lawful issue.

John F. Pott and *Frederick W. Pott* were still living and had children.

John F. and *Frederick Pott* claimed to be entitled, for their lives, to the share of *Georgiana*.

The next of kin of the testator contended, that *Georgiana* having attained twenty-one and died without issue, her share was undisposed of.

Mr. *Baggallay*, for the Petitioners, the trustees.

Mr. *Hobhouse* and Mr. *Forster*, for the next of kin, contended for the literal construction of the words "shall happen to die under the age of twenty-one years and without leaving lawful issue." They argued, that the modern authorities shewed that words of a will were to

to be construed strictly; *Brownsword v. Edwards* (*a*); *Grey v. Pearson* (*b*); *Seccombe v. Edwards* (*c*); *Day v. Day* (*d*). That here, if the word "and" was to be read "or," the effect would be to defeat the right of the issue of any of the four legatees who died at the age of twenty leaving issue. That far from effectuating the intention, the conversion of the words of the will would defeat it. That you must either read the words strictly, or strike out "under the age of twenty-one years."

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Mr. Wickens for the crown. There is a clear intestacy if the will be read in such a manner as to give to all the words their ordinary meaning, but no alteration will make the will consistent.

Mr. Southgate and Mr. H. Stevens, for John F. Pott and his two children. The share is given over in either of two events. The gift to the four was "as and when" they attained twenty-one, but if any of them died under that age, his share was (subject to the rights of the issue) to go to the survivors. So if any of them died without leaving issue, the survivors were to take his share. But this case does not depend on the change of the word "and" into "or," the expression *survivors* meant *others*, and there were cross remainders between the families. The whole residue is to go over, in mass, if all four "shall die without either of them leaving lawful issue." This shews an intention to keep the fund together until the death of the last survivor, and strengthens the construction that the survivors should take the share of those who predecease them, leaving no issue. There is also a gift over to the issue of the share which their deceased parent would have been entitled to in case he had survived any other of the four

(*a*) 2 *Ves. sen.* 249.
(*b*) 6 *H. of L. Cas.* 61.

(*c*) 28 *Beav.* 440.
(*d*) *Kay*, 703.

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four legatees who should afterwards die without issue. They referred to *Abbot v. Middleton* (a); *In re Keep's Will* (b); *Wilmot v. Wilmot* (c); *Douglas v. Andrews* (d).

The Master of the Rolls.

I cannot get over the express words of this will, though I have no doubt that there is some omission in it. I cannot read the word "and" as "or," for the express purpose of meeting the case which has occurred, for, by so doing, I should put two parts of the will in direct opposition, and if so, when the two parts of a will wholly contradict each other, the Court follows the last; this is, however, a mere arbitrary rule.

If I held "and" to mean "or," then under a different state of circumstances, I should have to determine, that "or" ought to be treated as "and," and thus make these two words convertible at the pleasure of the Court, according to the events which might have occurred. But *Grey v. Pearson* (e) decides that I must read words as I find them. I do not say, that the words of a will can never be controlled by the obvious general intention, for I acted on the contrary principle in *Abbott v. Middleton* (f), and should do so again, but this can only be done where the intention of the testator is clear, and where the alteration makes the whole will consistent and effective. Here I should get over one difficulty only to fall into another, and therefore, independently of the principle laid down in *Gray v. Pearson*, I cannot in this will turn the word "and" into "or."

I am of opinion, that there is an intestacy in this case.

- (a) 21 Beav. 143, and 7 H. of L. Cas. 88.
- (b) *Ante*, p. 122.
- (c) 8 Ver. 10.

- (d) 14 Beav. 347.
- (e) 6 H. of L. Cas. 61.
- (f) 21 Beav. 143.

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LECHMERE v. BROTHERIDGE.

THE question was, whether the real estate of a married woman, which was settled to her separate use, had been validly conveyed away by her by a deed executed by her, but which she had not acknowledged according to the formalities required by the Statute for the Abolition of Fines and Recoveries (a).

John Parker made his will in 1854, by which he devised his *Ashchurch* estate to three trustees, in trust for *Mrs. Brotheridge* for her separate use for life, and after her decease in trust for her husband for life, and after the decease of the survivor for their children as tenants in common in fee. There was no proviso preventing *Mrs. Brotheridge* from anticipating her income. In addition to this, the testator, by the same will, gave the residue of his real and personal estate to the same trustees and executors, upon trust to pay annuities of 10*l.* each to *Mrs. Brotheridge* and certain other persons during the life of *George Parker* and *Ann* his wife and the life of the survivor, and after the decease of the survivor (with the exception of two messuages) upon trust for *Mrs. Brotheridge* and two other persons, their heirs, executors, &c., in equal shares. But if any one of them three died without leaving issue before the period of division, his or her share was to go to the survivors or survivor; and if the one died and left issue, then the issue were to take their parents' share. The testator directed, that the share of *Mrs. Brotheridge* was to be for her sole and separate

May 1, 27, 29.

Where a wife has an estate for life in free-holds for her separate use, she can alienate that estate without any acknowledgment under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74).

But a married woman cannot dispose of her fee simple lands settled to her separate use, except by deed duly acknowledged under the Fines and Recoveries Act.

With respect to personal property, whether vested or contingent, settled to the separate use of a *feme covert*, she may deal with it as a *feme sole*, and either sell or encumber it.

Money settled to the separate use of a married woman is paid out of Court without any personal examination.

(a) 3 & 4 Will. 4, c. 74.

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separate use ; but there was no clause against her anticipating the income.

The testator died in 1855.

In 1856, Mr. *Brotheridge* had become largely indebted to Messrs. *Lechmere*, his bankers, and he and his wife gave to them the following security.

By an indenture dated the 17th of *December*, 1856, and made between Mr. and Mrs. *Brotheridge* of the first part, and Messrs. *Lechmere*, of the second part, the former granted and assigned to the latter, their heirs, executors, administrators and assigns,—first, the life interest in the *Ashchurch* estate ; secondly, the annuity of 10*l.* to which Mrs. *Brotheridge* was entitled under the will, and, thirdly, all the undivided one-third part and all other the share, whether vested or contingent, of Mrs. *Brotheridge*, or of the Defendant her husband in her right, in the residue of the real and personal estate of the testator, in trust to sell and pay the expenses, and, out of the remainder, to pay the debt due to the Plaintiffs on the balance of their account, with a proviso that the principal sum to be recoverable by the security should not exceed 1,000*l.*

This deed had never been acknowledged by Mrs. *Brotheridge* under the act for the abolition of fines and recoveries (2 & 3 Will. 4, c. 74, ss. 77 to 91).

*Ann Parker* was still living.

This suit was instituted in 1862 by Messrs. *Lechmere* against Mr. and Mrs. *Brotheridge* and the three trustees, praying for a sale of the property and payment to them of the amount due on their security.

Mrs.

Mrs. *Brotheridge* insisted, first, that the deed was invalid as against her, it not having been acknowledged by her under the statute (3 & 4 Will. 4, c. 74), and, secondly, that it had been executed by her under undue influence and by compulsion.

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Mr. *Selwyn* and Mr. *Wickens*, for the Plaintiffs.

That part of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, s. 77), which requires certain formalities in regard to married women, has no application to an estate settled to the separate use of a feme covert, who can dispose of her separate real estate without any acknowledgment of the deed. This must follow from the doctrine that a feme covert is, as regards her separate estate, in the position of a feme sole. She must, therefore, have all the incidents of an ownership as a feme sole, and amongst them the right of disposing of her separate estate in the same mode. If it be held that she is bound to acknowledge the deed under the 77th section, the concurrence of her husband in the deed would become necessary; so that the disposition by a wife of her separate estate would be dependent on his will, and thus property, over which the husband is to have no control, will be placed within his power. It was at one time doubted, whether a feme covert could devise her separate real estate; but Lord Justice *Turner*, in *Atchison v. Le Mann* (a), expressed his clear opinion that she could. Having, in that case, decided that the wife had a legal power to devise, he says (b), "It is not, therefore, as I think, necessary for us to decide the point, which was so much argued at the bar, whether *Jane Embleton Watkins* could, by will, have devised the estate under a limitation in fee to her for her separate use without any superadded power of appointment; but I am very strongly

(a) 23 L. T. 302.

(b) Page 303.

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strongly inclined to think that she could have done so, and, as at present advised, I should so decide the point, if it were necessary to decide it. It being settled that an estate in fee may be limited to the separate use of a married woman, thus giving her an absolute ownership, she must, I think, have all the rights of disposition which are incident to the ownership. The agreement of a married woman cannot bind her personal, but can bind her real, estate settled to her separate use; according to the cases of *Stead v. Clay* (*a*) and *Wainwright v. Hardesty* (*b*), upon what principle is her real estate so settled to be bound by her agreement, and not to be bound by her testamentary disposition?"

If, therefore, she has the power of disinheriting her heir by testament, *a fortiori* can she do so by a deed *inter vivos*.

But the point now before the Court has been expressly decided in *Ireland*. In *Adams v. Gamble* (*c*), it was held, that a married woman could dispose of freeholds settled to her separate use by a deed not acknowledged under the Fines and Recoveries Act.

Again, in *Minot v. Eaton* (*d*), a married woman, having a contingent fee to her separate use, executed a deed, by which she mortgaged it, and the question was, whether the estate given to her could be conveyed by lease and release executed by her and her husband without fine. Sir John Leach held it could, saying, "This lady, having an equitable fee to her separate use, could make a good tenant to the *præcipe* by lease and release; and she could well dispose of her equitable

(*a*) 1 Sim. 294.

12 Irish Ch. Rep. 102.

(*b*) 2 Beav. 365.

(*d*) 4 L. J. (O. S.) Ch. 134.

(*c*) 11 Irish Ch. Rep. 269, and

equitable fee without fine. My present opinion, therefore, is, that Mrs. *Prentis* has well conveyed the equitable fee which she had to her separate use." He took time to consider the question, and, remaining of the same opinion, made a decree for the Plaintiffs.

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On the second question, no improper influence was exercised, the Plaintiffs at least were not parties to any, and they cannot therefore be affected by it; *Bentley v. Mackay* (a).

Mr. F. C. Miller for the trustees.

Mr. W. Forster for Mrs. *Brotheridge*.

First, this deed was executed under undue influence and pressure, and effect ought not to be given to it.

Secondly, no valid conveyance of her real estate has been executed. To pass her real estate, the statute 3 & 4 Will. 4, c. 74, requires that a *feme covert* shall acknowledge every deed disposing of it (b) before a Judge, in the form and manner pointed out by the act, and no disposition is to be "valid and effectual" unless the deed be so acknowledged. In the 77th section, which empowers a married woman to dispose of any estate in land "which she alone or she and her husband in her right may have," the words "which she alone" can only refer to her separate estate in lands. These, therefore, are included in the act. The object of the limitation to her separate use is, to protect her from her husband, and not to extend her power of disposition; *Harris v. Mott* (c). The separate examination and the acknowledgment that she freely and voluntarily consents

(a) 31 Beav. 143.

(b) Sect. 79.

(c) 14 Beav. 170.

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sents to the deed, and the other formalities required by the Fines and Recoveries Act, were intended for the protection of a married woman, and the separate use has the same object; but if the Plaintiffs' contention were to prevail, the real protection intended by the legislature will be wholly destroyed by the unavailing protection afforded by the Court under the separate use clause. He also relied on *Peacock v. Monk* (*a*) ; *Field v. Moore* (*b*) ; *Churchill v. Dibben* (*c*) ; *Crofts v. Middleton* (*d*) ; *Blachford v. Woolley* (*e*) ; *Sanders on Uses* (*f*) ; *Roper's Husband and Wife* (*g*).

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#### *The Master of the Rolls.*

*May 27.*

The question in this cause was, whether the real estate of the wife settled to her separate use was conveyed away by her without any acknowledgment under the statute.

The property was derived by her under the will of *John Parker*, the effect of which is, that in the *Ashchurch* property Mrs. *Brotheridge* took an estate for life for her separate use, and she also took an absolute reversionary interest in one undivided third part of the residue, both real and personal, subject to the life estate of Mr. *Parker* and his wife, and this interest the testator directed to be held for the separate use of Mrs. *Brotheridge*; but the will contains no clause against her anticipating the income.

The testator died in 1855, and in 1856, Mr. and Mrs. *Brotheridge* executed a security to the Plaintiffs, who now

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|-------------------------------------------------------------------------------|-------------------------------------------------------------------------|
| ( <i>a</i> ) 2 <i>Ves. sen.</i> 190.                                          | 2 <i>Kay &amp; J.</i> 194.                                              |
| ( <i>b</i> ) 19 <i>Beav.</i> 176; 7 <i>De G.</i> ,<br><i>M. &amp; G.</i> 691. | ( <i>c</i> ) 32 <i>L. J. (Ch.)</i> 534.                                 |
| ( <i>c</i> ) 9 <i>Sim.</i> 447, <i>n.</i>                                     | ( <i>f</i> ) <i>Vol. 1, p. 380 (5th edit.)</i>                          |
| ( <i>d</i> ) 8 <i>De G., M. &amp; G.</i> 192;                                 | ( <i>g</i> ) <i>Vol. 2, p. 182 (2nd edit.)</i> ,<br><i>c. 19, s. 2.</i> |

now desire to realize it. The trustees, in whom the legal estate is vested, decline to take any step in the matter, except under the direction of the Court.

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The defence set up on the part of Mrs. *Brotheridge* is, first, that the deed was not duly acknowledged by her under the 77th section of the statute 3 & 4 Will. 4, c. 74. Secondly, that the deed was executed by her under compulsion, and without the contents and effect of it being properly explained to her.

The second point of defence I deal with first. This may be disposed of very summarily; the evidence shews that the deed was properly explained to her, and although she states, I have no doubt correctly, that the deed was executed under the pressure put upon her by her husband, yet as no part of this pressure proceeded from the Plaintiffs, and as moreover no suit is brought to cancel or correct the deed, it is impossible that this defence can be sustained in this suit as against the Plaintiffs.

The other defence is, that the deed in question was not acknowledged by the wife. This is a very different matter and requires a much more careful consideration. The words of the section are these, "It shall be lawful for every married woman in every case, except that of being tenant in tail" . . . "to dispose of land of any tenure," . . . : "and also to dispose of, release, surrender or extinguish any estate, which she alone or she and her husband in her right may have in any lands, of any tenure, as effectually as she could do if she were a *feme sole*." It then provides that no such disposition shall be valid unless her husband concurs in the deed, nor "unless the deed be acknowledged by her as hereinafter directed."

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estate for the separate use of the wife rests, that where the wife has an estate for life for her separate use in freehold hereditaments, she can alien that life estate without any acknowledgment under the statute referred to, and that no fine was necessary for that purpose previously to the passing of that act. I think that both the decided cases and the opinions of text writers concur in this matter, and the principle to which I am about to refer, in considering the third question, explains the view I take. I am, therefore, of opinion that the Defendants the trustees will be bound to account for the rents of the *Ashchurch* estate to any person who may become the purchaser thereof under a sale to be made by the Plaintiffs. The legal estate is in the trustees, and although it is not their duty to convey the legal estate to a purchaser, it is the duty of the trustees, in my opinion, to give to the purchaser of such life estate of Mrs. *Brotheridge* exactly the same facilities for taking and receiving the rents of the *Ashchurch* property as they have given to her. The purchaser, in fact, will be exactly in her place, entitled to all the same rights and subject to the same liabilities.

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The next property assigned is the annuity of 10*l.* per annum during the joint lives of Mrs. *Brotheridge* and the survivor of the Defendant Mr. *Parker* and of his wife. This annuity is not given to the separate use of Mrs. *Brotheridge*, if the will be correctly set forth in the pleadings, consequently, the deed does not bind the reversion in this property, and the trustees, therefore, are bound to pay this annuity to the purchaser under the deed of 1856, during the joint lives of Mr. and Mrs. *Brotheridge* only, liable however to its wholly ceasing on the death of the survivor of Mr. and Mrs. *Parker* before that period.

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The third property assigned is the one-third of the residue of the real and personal property, subject to a possible contingent accrue, by the death without leaving issue of either or both of the other residuary devisees before the decease of the survivor of Mr. and Mrs. Parker. This is given to the separate use of Mrs. *Brotheridge*, and this requires to be considered, first, as regards the real estate, and next as regards the personal estate.

First, as regards the real estate, this is given to Mrs. *Brotheridge* in fee for her separate use. It does not at present appear to me, for the purpose for which I am now considering this question, that it is a matter of much moment that the interest of Mrs. *Brotheridge* is reversionary, what I have to consider is, whether the words "separate use," as applied to a devise of freehold hereditaments to a married woman in fee simple, have such an effect as to give her a different quality of estate, in the contemplation of equity, as to the manner in which she may alien the same, from that which she would take in the same lands if these words "to her separate use" were omitted.

Upon the best consideration I have been able to give to the subject, I think that, in such a devise, the words "separate use" have, as regards the alienation of the inheritance of the property, no such practical effect, and that if a married woman attempted before the statute to dispose of such lands, she must have levied a fine for that purpose, and that since the statute, an acknowledgment under the 77th sect. is equally necessary. When I endeavour to attach a meaning to the words "separate use" as applicable to the fee simple estate of a married woman, I find much difficulty in doing so, if they go further than to bar the interest in the real estate of the wife, which, without such words, the husband would have

have taken. These words, in other cases, are meant to bar the interest of the husband ; that interest, in the cases of the fee simple estate of a married woman, consists in the receipt by him of the rents of the property during their joint lives, and also during his life, as tenant by the courtesy, if they had a child.

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It seems to be decided by the case of *Baggett v. Meux* (a), that the addition of the words "without power of anticipation" (which as applied to a life estate of a married woman in lands are intelligible and pertinent) can be also applied to the absolute interest of a married woman in land, so as to prevent her from selling or mortgaging the property. If this proposition be correct, which seems to be placed in some doubt by the late case of *Blachford v. Woolley* (b), then it is obvious, that a gift of land in fee simple to a married woman, for her separate use, with a restraint against anticipation, is merely another way of giving her a life estate for her separate use without power of anticipating the rents ; for if she cannot alien, her interest would be confined to this, except that the words "separate use," according to *Atchison v. Le Mann* (c), involve this :—that the wife is to be at liberty to dispose of the land by will in any way she may think proper, without the concurrence of her husband. But it seems strange, that if the power to devise it is included, the power to alienate by deed is not also included ; nor is it easy to understand how the restraint upon anticipation can be properly applicable to such an estate, except that the whole doctrine of separate estate and its union with a restraint against anticipation is altogether anomalous.

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(a) 1 Colly. 138, and 1 Phil.  
627.

(b) 11 W. R. 478.  
(c) 23 L. T. 303.

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It is laid down by Lord Justice *Turner* in *Atchison v. Le Mann*, that a married woman may dispose, by will, of land given to her for her separate use during coverture, though the devise or grant to her contained no power for that purpose. This is undoubtedly an important decision, and was strongly relied upon before me, and if it be settled, that where property is given absolutely to a married woman the mere addition of the words "*for her separate use*" will necessarily imply a power to dispose of it by will, it has a strong bearing on the case before me, although by no means decisive. It was not, however, necessary to decide that point in the case I have referred to; but assuming it to be so decided, the contention here advanced goes far beyond this, for the contention here is, not only that she may dispose of the land by will, but that she may do so by sale or grant; and that, not only without the concurrence of her husband, but that she may also do so without the forms expressly imposed by the statute. In other words, the contention here is, that the words *separate use*, as regards alienation *inter vivos*, have this and no other meaning than this: "I give my estate to A. and her heirs for ever, for her separate use; and I do so in order to enable her to dispose of it without any acknowledgment under the statute." But I think that it is not in the power of any testator to avoid this statute by the introduction of such words, any more than he could have done if he had expressed his meaning distinctly thus:—"I leave Whiteacre to A. and her heirs for ever, and I declare, that my intention is, that she may dispose of the same without fine or acknowledgment under the statute of 3 & 4 Will. 4, c. 74."

The common law of the land, in fact, independently of equity, treats the wife as the separate owner of the land, so far as the inheritance in it is concerned. This does

does not pass to her husband, and the common law provides a mode by which she may dispose of this, which is her separate interest in her land, in the lifetime of her husband, viz.,—by fine or recovery and not otherwise. For this common law conveyance, the statute substitutes an acknowledgment before a constituted officer. How can a testator or grantor repeal this act, and also stay the operation of the common law, by the introduction of the words “separate use?” The effect of these words I think is confined to this, viz.,—they apply to and bar the husband from receiving what, without such words, he would have received, viz.,—the rents of the property during the life of the wife, and also during his tenancy by courtesy, in case he had a child by her; but how can these words “separate use” add anything to what is her own, separately and distinct from her husband, or how can they add anything in order to enable her to dispose of what was her separate property without such words, viz., the inheritance in the land, and to do this in a different way to what she could have done before the statute. In other words, I cannot understand how these words can have the magical effect of repealing the express words in the clause of the statute.

I state it again in a different way:—A devise of lands is made to a married woman in fee, without any additional words. This gives a portion of the usufruct of that land to her husband, and leaves the rest in her. What is the husband’s he can dispose of without her consent; he can sell the rents for the joint lives of both and also during his own estate by courtesy, but he cannot touch anything beyond this; to do that, a conveyance from the wife has always been and is necessary. It is her separate property by common law, the mode by which she conveyed it was by fine or recovery before the act passed,

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passed, and since the act by acknowledgment under the 77th section. Then take the next step:—A devise of these same lands is made to the married woman in fee, superadding the words “*for her separate use.*” These words are confined to barring the husband’s interest and giving his interest in the lands to the wife, but how can these words alter the estate of the wife in that portion of the property which never went to the husband at any time, and over which he never could have had any controul.

This is how it strikes me on principle, but it remains necessary to consider the authorities. The cases cited and relied on by the Plaintiffs for this part of their argument are principally two, viz., *Atchison v. Le Mann* (*a*) and *Adams v. Gamble* (*b*).

The former of these cases does not, I think, govern this question. The only question there was, whether the wife had an estate for life with a power of disposing of it by will, or whether she took an estate in fee simple in the lands. The Vice-Chancellor *Wood* and the Court of Appeal both held that she took an estate for life with a power of disposing of it by will, and that she had so disposed of it in favour of her son, through whom the Defendant claimed. The question did not and could not arise in that case; it is, in fact, principally cited for the *dictum* of the Lord Justice *Turner* to which I have already referred, but respecting which, as it does not arise in this case, and cannot in my opinion influence the decision, I shall abstain from expressing any further opinion.

In the second case the facts were these:—The testator devised a real estate to his daughter, a married woman,

(*a*) 23 L. T. 302.

(*b*) 12 Irish Ch. Rep. 102.

woman, in fee, "reserving it in her own power from any husband." The daughter while under coverture conveyed the estate by a deed, which was not acknowledged under the Fines and Recoveries Act, and after her death, the validity of that deed was contested by her heir at law. That case, therefore, expressly raises the point before me, and as expressly decides it in favour of the Plaintiff and contrary to the opinion I have expressed. I have carefully read and considered that case, but I am unable to concur with the two learned Judges who dissented from the Lord Chancellor on that occasion. If the decision had been unanimous, I should not have ventured to differ from it, but as the Lord Chancellor, on reflection, adhered to his previous opinion (*a*), the case cannot possess that weight it would otherwise have had.

The distinction I have endeavoured to point out, that the words "*separate use*" only apply to what the husband would have taken without the use of these words, does not appear to me to have been sufficiently present to the minds of the learned Judges who dissented from the Lord Chancellor on that occasion. *Baggett v. Meux (b)* was then referred to and relied upon; but that case seems merely to decide that the restraint against anticipation, or rather a prohibition against parting with or disposing of her estate, may be applied to the fee simple of the married woman given to her separate use. The other case relied upon (*Major v. Lansley (c)*) is an instance of the alienation of the life estate in a rent charge of a married woman given to her separate use.

The point certainly is not one without difficulty, but when I consider the authorities treating on this matter referred

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(*a*) See 11 *Ir. Ch. Rep.* 44, 269. (*c*) 2 *Russ. & Myl.* 355.

(*b*) 1 *Colly.* 138 and 1 *Phil.* 627.

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referred to on the other side, beginning with *Peacock v. Monk* (*a*), although not bearing distinctly on the exact point before me, I am of opinion that I am compelled to choose between conflicting authorities, and that the preponderance, both in principle and authority, establishes, that before the 3 & 4 Will. 4, c. 75, a fine was necessary to pass the interest of a married woman in that part of the fee simple estate which did not belong to her husband, and that since that statute, an acknowledgment under the 77th section is still necessary for that purpose, notwithstanding the addition of the words that the estate of the wife is "*for her separate use*."

It is to be observed that the property is reversionary; I doubt whether this affects the case, but if it produce any effect, it only increases the difficulty I have felt in giving to the words "*separate use*" the effect contended for by the Plaintiffs. It is manifest that but for these words *separate use* in the testator's will, the deed of 1836 would merely amount to a covenant by the husband and wife, that the wife should make the acknowledgment required by the statute when the estate fell into possession, which would in no respect bind the wife. But in fact, this leaves the question where it was, viz., whether, when the words "*separate use*" are used, the statute is made nugatory, and the wife enabled irrevocably to convey her reversionary fee simple estate without any acknowledgment.

I am of opinion that the words of the 77th clause are applicable to this estate in fee simple, though given for her *separate use*. I think, on principle, that before the statute a fine would have been necessary for this purpose, and I have met with no cases which lay down

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(a) 2 Ves. sen. 190.

a contrary doctrine. I am of opinion, therefore, that the deed of *December*, 1856, does not affect the reversionary estate in fee simple of Mrs. *Brotheridge*.

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I come now to consider how it operates on that portion of the residue given to Mrs. *Brotheridge* which consists of personalty. With reference to this, the statute has no application, and it has undoubtedly been repeatedly held by the Court of Chancery, and it is the constant practice, to allow a married woman to deal with a money legacy given to her absolutely *for her separate use* as her own, that is, her receipt alone is all that is necessary for the protection of the executors, and her application to this Court to have the money paid to her or to any one she may direct is always complied with, without any examination or ascertainment of her unbiased wish that this should be done. I cannot, in respect of personal property, make any distinction between that which is immediately receivable and that which is reversionary. If it be her property as a *feme sole*, she may deal with it as a *feme sole*, and sell or incumber it as she pleases. The words "*separate use*" here exclude the marital right from attaching to any portion of the property, whether he survives the tenant for life or not. Accordingly, as to all the residue of the personalty coming to her, whether vested or contingent, I am of opinion that it is bound by the deed, and will pass to anyone who may buy it from the Plaintiffs, and that the trustees, the Defendants, will be trustees of that one-third, for the benefit of such purchaser and his assigns when the same may fall in.

I will make a decree declaring the right according to my decision.

NOTE.—See *Bestall v. Bunbury*, 13 *Irish C. Rep.* 318.

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*Feb. 18, 19.
March 19.*

When a father purchases in the name of his child, his declarations of intention contemporaneous with the transaction itself are alone admissible to prove a trust.

Parol evidence is admissible to prove that lands were purchased by a father in the name of his child not as an advancement but as a trustee.

Purchases and mortgages were taken by a father in the name of his son. The father received the rents and interest and paid them into a bank, but he allowed his son to draw for the sums he required. The son died first:—*Held*, that the presumption of an advancement was not rebutted.

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THE facts of the case are fully stated in the judgment, and need not be repeated.

Mr. Selwyn and Mr. G. Whitbread for the Plaintiff.

Mr. Lloyd, Mr. Nalder and Mr. Everett for the Defendants.

Murless v. Franklin (a); Bone v. Pollard (b); Dumper v. Dumper (c); Sidmouth v. Sidmouth (d); 29 Car. 2, c. 3, s. 7, were cited.

The MASTER of the ROLLS.

I am satisfied that parol evidence is admissible, even though the subject be real estate. I will consider the case.

The MASTER of the ROLLS.

Mar. 19.

The question in this cause is, whether certain purchases made by the father in the name of his son, who had since died, were intended to be advancements for the benefit of his son, or whether the son was a trustee of them for his father.

The various transactions are these:—In December, 1855, the Plaintiff, who is an auctioneer and cattle dealer

(a) 1 Swanst. 13.
(b) 24 Beau. 283.

(c) 3 Giff. 583.
(d) 2 Beau. 447.

dealer in the county of *Carmarthen*, lent 1,600*l.* to a Mr. *Evan Evans*, on the security of an estate in the parish of *Llangranog*. The mortgage was, by his direction, made out in the name of the son *Thomas Williams* the younger, as the mortgagee, and the property conveyed to him accordingly.

In *February*, 1856, the Plaintiff lent 600*l.* on the security of an estate in *Llandingat*, called the *Baileyglaes* estate, and the mortgage was made in the name of his son as the mortgagee, and the property conveyed to him accordingly, for a term of ninety-nine years to secure the amount.

In the same year, the Plaintiff laid out 645*l.* in the purchase of an estate called *Gilwenfach*, and in the conveyance the money was expressed to be paid by the son and the conveyance made to him in fee.

In *October*, 1855, the Plaintiff lent 605*l.* on the security of a messuage called the *Black Swan*, to two persons of the name of *David* and *Thomas Jones*, who signed a receipt for the amount and an undertaking that, as the money had been paid by the son of the Plaintiff, they would assign the mortgage deeds to the son or as he should appoint. In all these cases, the form of the transaction which represented the son as the lender of the money or the purchaser of the estate was sanctioned by the direction of the father.

In 1860, the Plaintiff laid out the sum of 1,230*l.* in the purchase of an estate called *Pentwyn*, in the county of *Carmarthen*, and the deed of conveyance, which was executed on the 1st *October*, 1860, expressed that the consideration money had been paid by the Plaintiff's son, and the conveyance was to him in fee.

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In this case there is a conflict in the evidence as to whether the father sanctioned the form of the conveyance to his son in fee.

On the 9th of *October*, 1860, the son died and left a widow and five infant children. On the day of his death he executed a will, by which he left the *Pentwyn* estate to his son *William Williams* in fee. He gave the interest of the mortgage of the *Black Swan* to his wife, for the maintenance of herself and her children during her life, and after her death he directed the principal to be divided amongst his five children equally. He bequeathed the *Baileyglaes* mortgage in like manner. And he gave all the residue of his real and personal estate, subject to the payment of his debts, funeral and testamentary expenses, to be equally divided between his wife and his five children, and he appointed his wife and eldest son executors of his will.

The question is, whether these three mortgages and two estates belong to the estate of *Thomas Williams* the younger, deceased, or whether they belong to the Plaintiff, the legal estate in them only having been vested in his son, which has descended on the infant Defendant *William Williams*.

This is solely a question of intention, it depends upon what the intention of the Plaintiff was, when he made these purchases and these advances on mortgage, not what his intention now is. Each case also must be taken separately, and it must be ascertained what his intentions were, on the occasion of each separate transaction, by the evidence accompanying and contemporaneous with the transaction itself. The first and most important matter is this:—It is established, that, in all the first three cases, the conveyance, and in the fourth

fourth case the memorandum, was made out in the name of the son, with the knowledge and assent and direction of the father, the Plaintiff; on this I think the evidence distinct. On the last, namely, the purchase of *Pentwyn*, which took place only nine days before the son's death, the Plaintiff asserts that it was conveyed to his son without his authority or direction. This therefore, will require to be more closely examined by the evidence.

It is clearly established that the money was the father's. It is also, I think, established, that the father received the rents of the estates and the interest of the mortgages, for, though they were paid into a bank where, by the father's direction, the son's cheques were honoured, still I think the father had the control over the whole fund, and could at any time have stopped the son's drawing.

The other facts established by the evidence which bear on the subject are to this effect:—That the father had, in a great measure, retired from business; that he took out a licence as an auctioneer for his son, and that his son assisted him throughout in carrying on his business. If there were no further evidence in the case than that which I have above stated, and it stood alone on these facts, it would not, I think, constitute the son a trustee for the father.

But there is additional and important evidence which it is essential to examine very accurately, bearing always in mind, that the contemporaneous evidence of the transaction is that which alone can be relied upon, and that I must examine this case very much as I should have done if the contest had arisen, after the death of both, between the devisees of the father and the present Defendants,

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fendants, instead of being, as it is, a contest between the Plaintiff and the present Defendants.

I think myself, therefore, bound to reject from consideration all that portion of the evidence of the father now as to what his intentions were before. The decided cases shew that his present declaration to that effect could not have been regarded after his decease to create a trust in the son, and I consider myself equally bound to disregard them now, although he is alive. On such occasions, the declaration to that effect by the father must be contemporaneous with the event itself.

I come, therefore, to consider the evidence adduced by the Plaintiff to establish that these transactions constituted trusts in the son and not advancement to him. The first fact brought forward is a letter of the son to the mortgagor; but I do not find anything in this letter that indicates a trust in the son. That the money was the money of the father is, of course, admitted; unless it were so, the question could not arise; but this letter looks to me as if the son considered that he had an interest in the matter, whether as joint owner with his father or not is not clear, but he talks of "paying us off." In the case of the mortgage of the property at *Llangranog*, two gentlemen, one of whom is the solicitor of the mortgagor and the other the solicitor of the Plaintiff, state, that though he gave directions to have the mortgage made out in the name of his son, he said that his son should hold the property in trust for him. Mr. *Lloyd* very properly suggested that this should be accomplished by a deed or written declaration of trust, which the Plaintiff declined. There are also two letters written by the son in the Plaintiff's exhibits. The first is the 3rd of November, 1859, to the Rev.

E. Evans,

E. Evans, mortgagor of the *Llangranog*, and the second is to Mr. *Lloyd*, the solicitor of Mr. *Evans*.

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The rest of the evidence does not appear to bear on the question before me, it simply shews that the son managed the property for his father, that the money was the father's, that he received the rents and allowed his son to draw on the bank for the sums he required. There are also some acts of ownership, as notices to tenants and the like, which were necessarily made in the name of the Plaintiff's son. The principles of law to be applied to these facts appear to me to be admirably laid down in the judgment in the case of *Grey v. Grey* (a). I cannot better explain my meaning than by reading the parts of that judgment which, in my opinion, govern this case :—

"Generally and *prima facie*, as they say, a purchase in the name of a stranger is a trust for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent. 2. But yet it may be a trust, if it be so declared antecedently or subsequently under the hand and seal of both parties. 3. Nay, it may be a trust if it be so declared by parol, and both parties uniformly concur in that declaration. 4. The parol declarations in this case are both ways, the father and son sometimes declaring for and sometimes against themselves. 5. *Ergo*, there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. 6. And herein the great question is, whether the law will admit of any constructive trust at all between father and son. 1st. For the natural consideration of blood and affection is so apparently predominant that those acts which would imply a trust in a stranger will not

(a) 2 *Swansl. App.* 597.

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not do so in a son; and *ergo*, the father who would check and control the appearance of nature ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law, for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions. 2nd. The wisdom of the common law did so; for all the books are agreed on this point, that a feoffment to a stranger without a consideration raised a use to the feoffor; but a feoffment to the son, without other consideration, raised no use by implication to the father, for the consideration of blood settled the use in the son and made it an advancement. How can this Court justify itself to the world if it should be so arbitrary as to make the law of trusts to differ from the law of uses in the same case? . . . . *Ergo*, where the father intends a trust, he ought to see it declared in writing, or supported by direct proof, and not rest upon constructions." (a)

I think all these observations apply to the present case, and applying this law to the facts in the present case, though I cannot but say, that though I feel some hesitation respecting the extent of reliance which ought to be placed on the recollection of Mr. *Lloyd* and Mr. *Bishop* of the exact words spoken by the Plaintiff, yet assuming that, at the date of the loan, the Plaintiff told these gentlemen that the transaction was intended to be a trust in the son for his benefit, that this was said in the presence of the son and assented to by him at that time, then I am of opinion that this must be treated as a contemporaneous declaration of trust, which undoubtedly may be made by parol.

It is no doubt difficult to understand why the Plaintiff, in these circumstances, directed the mortgage to be made

(a) *Loc. cit. p. 600.*

made in the name of the son, if he was to be merely the trustee. For in that case the usual object of these transactions would have been frustrated. If the son had survived the Plaintiff, the estate of the father would have been just as liable to probate and legacy duty as if such conveyance had not been made out in his son's name. Still, as both the gentlemen give plain and unequivocal evidence of the parol declaration of trust made by the father and assented to by the son at the time, I consider myself bound by it and must declare the trust accordingly. The receipt of the rents by the father, as I have stated from the judgment I have read, amounts to nothing.

As to the other three transactions which took place before the purchase of *Pentwyn*, I am of opinion that they must be taken to be advancements by the father to the son. There is in fact nothing to rebut it, but, first, the receipts of the rents and interest by the father, which were paid to his account at the bank where the son might draw for what he required; and secondly, the present statements of the father, which, as I have already said, are not sufficient to rebut the necessary presumption of law.

The case of the purchase of *Pentwyn* is a very different matter; the execution of the deed conveying this property was only eight days before the death of the son. The evidence respecting it, to which I once more refer in detail, amounts to this:—that the father (the Plaintiff) gave instructions on the subject to Mr. *Bishop*, who prepared the conveyance, to have the deed made out to him as purchaser, and that afterwards, by the direction of the son, the conveyance was altered into the name of the son, and as this was in accordance with what had been done on former occasions, and with the conduct

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conduct pursued by the son for the father and with his sanction for a great length of time, Mr. *Bishop* complied with this direction. It is true that the devise of this estate by the son is expressly opposed to this evidence, and shews that he considered himself entitled to deal with it as owner. But still I cannot, on this evidence, find that the deed was made out in the name of the son as purchaser, in accordance with any general or particular authority of the father given to the son, or that it was done by the direction of the father, and although the will of the son is a positive declaration that the property is his, still I cannot, I think, allow this statement to counterbalance the positive and contemporaneous direction given by the father to Mr. *Bishop* and established by his evidence, although the father does not appear to have remonstrated, either with his solicitor or with his son during his lifetime, for the form in which the deed had been prepared and executed in disobedience to his instructions.

Upon the whole of this case, therefore, I am of opinion that as to the mortgage for 1,600*l.* on *Llangranog* and the purchase of the *Pentwyn* estate, the son must be declared to have been a trustee thereof for his father; but as to the remaining three transactions, they must be taken to have been advances and purchases made by the father for the benefit and advancement of his son, and that, on the death of his son, they belonged to him and passed as his property, under the directions contained in his will.

I have thought it unnecessary to refer to the other decisions cited before me or those which I have referred to myself; they all, and more especially the case of *Sidmouth v. Sidmouth* (a), appear to me to illustrate and

(a) 2 *Beav.* 447.

and confirm the principles laid down in *Grey v. Grey* (a), which I have read at length. I shall make a declaration accordingly and give no costs on either side, if indeed (which I apprehend would not have been the case) any costs had been asked for.

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(a) 2 *Swans.* 594.

### *Re BLAKESLEY AND BESWICK.*

April 30.

ON the 20th of June, Lady *Sophia Giubelei* entered into a negotiation in London, for a loan to her of 8,000*l.* by way of mortgage. That sum was to be advanced to her in London on Tuesday, the 24th of June, by Mr. *Thorp* of Leeds, through his solicitors Messrs. *Blakesley & Beswick* of London, and Lady *Sophia* undertook to pay their reasonable costs in the matter if it went off.

An intended mortgagor agreed to pay the reasonable costs of the mortgagor's solicitor, if the matter went off:—*Held,* that this did not include the expenses of withdrawing the money from a banker's and of remitting it to London for payment.

Application of a solicitor, after an order for taxation, to withdraw a non taxable item from his bill, refused.

Lady *Sophia Giubelei*'s title to the property was rejected on Saturday the 21st, but this was not known to Mr. *Thorp* of Leeds until Monday following. In the meantime, on Saturday the 21st of June, Mr. *Thorpe*, in anticipation of the completion on Tuesday, had withdrawn the 4,000*l.* from his deposit account at his bankers, and had directed them to remit the amount to London. For this they charged him 10*l.* commission.

The matter went off, and Messrs. *Blakesley & Beswick* sent in their bill of costs to Lady *Sophia Giubelei*; this included the charge for 10*l.*, which, on the taxation, the Taxing Master allowed.

Mr. *Jessell* now moved to review the taxation, and that

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that the 10*l.* might be disallowed. He argued, first, that this charge was not comprised in the undertaking, for if bullion had been sent, the expenses would not have been chargeable on the borrower; secondly, that it had been unnecessarily incurred before the title had been accepted; and thirdly, that it ought not to be charged in the bill of the solicitors, who had not paid it.

**Mr. Phear, contra.** This was one of the "reasonable costs" in the matter, and which the intended mortgagor had undertaken to bear. The remittance was made *bonâ fide* for the benefit of the borrower, who wanted the money on *Tuesday*, and to prevent her being disappointed in receiving it on that day.

#### *The Master of the Rolls.*

I think this charge must be disallowed. It is clear that when a person borrows money and agrees to pay the costs of the lender, that does not include the expenses incurred by the lender in getting the money.

I never heard that a mortgagee was, under such circumstances, entitled to charge the mortgagor with his broker's commission for selling out stock, or for realising railway debentures, or for raising the money.

This is a stronger case: here the intended lender asks for the expenses which his bankers charged him for withdrawing the money and sending it to *London*, and which expense he thought fit to incur before he had accepted the title. I think that this sum is not included in the costs undertaken to be paid.

Neither can I accede to the proposal, that the solicitors should be allowed to withdraw this item from their bill

bill of costs. In all these cases such items are charged *bond fide*; but a solicitor cannot be permitted, during taxation, to say, that there are items which he should not have included, and withdraw them; for the client, on the other hand, would say, "I would not have taxed the bill if they had not been included in it."

I must disallow this 10*l.*

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### BICKNELL v. BICKNELL.

A SUIT was instituted by several infants, by their next friend, and a decree had been made.

One of the Plaintiffs, having attained twenty-one, and being desirous of retiring from the suit,

Mr. Wickens, on his behalf, moved to stay proceedings as regarded him, or that his name might be struck out as co-Plaintiff. He cited *Acres v. Little* (*a*); *Guy v. Guy* (*b*); and see *1 C. P. Cooper* (*c*); and *Ballard v. White* (*d*).

*April 30.*

After decree in a suit instituted by several infants, one came of age and objected to remain co-Plaintiff. His name was struck out as co-Plaintiff and he was made a Defendant.

Mr. Renshaw, for the next friend, referred to *Anonymous* (*e*), and said that the suit was nearly wound-up.

### The MASTER of the ROLLS.

I cannot stay the proceedings in the suit after decree. The proper order, if you ask it, is this:—On the application

- (*a*) 7 Sim. 138.
- (*b*) 2 Beav. 460.
- (*c*) Page 372.

- (*d*) 2 Hare, 159.
- (*e*) 4 Madd. 461.

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cation of this Plaintiff to strike out his name, and, on the application of the co-Plaintiffs, make such Plaintiff a Defendant, and in all future proceedings his name will be introduced as a Defendant. If that be not asked, I must simply strike out his name. Let the costs be costs in the cause.

In re CHAPMAN'S WILL.

April 18.

A testator bequeathed a legacy to such of his nephews and nieces (children of A. B.) as should be living at his death equally, and he provided as follows, that in case any nephew or niece "shall die in my lifetime," leaving children living at my decease, such children should stand in their parents' place and be entitled to the share which the deceased parent would have been entitled to, if living at my decease. A child of a niece who had died prior to the date of the will was held entitled to participate in the legacy.

BY his will, dated in 1860, the testator bequeathed the sum of 3,000*l.* "unto such one or more of his nephews and nieces (children of his late sister *Sarah Mallieu*, deceased) as should be living at his death, equally." And he gave the residue of his estate equally "between such of the persons, next hereinafter mentioned or referred to as intended to take the same, as should be living at his death, that is to say," the "children of my late sister *Sarah Mallieu*, deceased," and others whom he specified. He then proceeded thus:—"Provided always, and I hereby declare, that in case any of my nephews and nieces, or great nephews and great nieces, shall die in my lifetime leaving any child or children who shall be living at my decease, and who shall then have attained, or shall live to attain, the age of twenty-one years, then and in such case, it is my will, that the child or children attaining the said age of each such nephew or niece or great nephew or great niece so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent, and shall be entitled to the same share or shares and interest,

interest, as well original as accruing, in the pecuniary legacies hereinbefore bequeathed and in my residuary personal estate, as his, her or their deceased parent would have been entitled to if living at the time of my decease."

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The testator died in 1861.

Sarah Mallieu had three children, who survived the testator, but she had had a fourth child, *Hannah*, who had died in 1844, anterior to the date of the will, leaving one child *Elizabeth H. Wrigley*.

A question had arisen, whether *Elizabeth H. Wrigley* was entitled to a share of the legacy of 3,000*l.*, which had been paid into Court.

Mr. *Baggallay* and Mr. *Lewin*, for the children of *Sarah Mallieu*. The substitution is in favor of nephews and nieces who "shall" die, that is a future event, and refers to those who shall die after the date of the will. The gift is in favor of those whose parents might have taken under the will, but no nephew or niece, who had died prior to the date of the will, could have been a legatee under it. There must be an original valid gift to some one in order to found a substitution for it.

They cited *Christopherson v. Naylor* (*a*) ; *Butter v. Ommaney* (*b*) ; *Waugh v. Waugh* (*c*) ; *Loring v. Thomas* (*d*).

Mr. *Renshaw* for the trustees.

Mr. *Southgate* and Mr. *Langworthy*, for *Elizabeth H. Wrigley* and her husband, were not heard.

The

(*a*) 1 *Mer.* 320.
(*b*) 4 *Russ.* 70.

(*c*) 2 *Myl. & K.* 41.
(*d*) 1 *Dru. & Sm.* 497.

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The Master of the Rolls.

I think this legacy is divisible into fourths. If the original gift had stood alone, "I give 3,000*l.* unto such one or more of my nephews and nieces, children of my late sister *Sarah Mallalieu*, as shall be living at my death," there could be no question but that the nephews and nieces who survived would alone be entitled to participate in the legacy. But I think that there is sufficient on this will to shew, that the children of nephews or nieces who were dead at the date of the will were to take. Much stress cannot be placed on the words "shall die in my lifetime;" it is vague. It is argued, that it means "shall hereafter die," but I think the expression is constantly used in the sense "shall be dead at the time of my death."

I accept the construction of *Christopherson v. Naylor* (*a*); but here the words are distinct, in case any of my nephews, &c., "shall die in my lifetime leaving any child," that is, shall die at any time in my life leaving children, who shall be living at my death and attain twenty-one. Here is a child of a niece who died in the testator's lifetime and which child was living at his death and has attained twenty-one. Then the testator says, she "shall represent and stand in the place of" her deceased parent, and shall be entitled to the same share as her parent "would have been entitled to if living at the time of his decease."

It is clear, that the niece *Hannah* would have taken one-fourth if she had been living at the time of the testator's decease, and her daughter is consequently entitled to stand in her place.

(*a*) 1 *Mer.* 326.

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April 18, 20.

Re GIRAUD.

BY indentures dated in 1833, a freehold messuage, &c., was conveyed to *Charles Louis Giraud* in fee, by way of mortgage for securing the repayment of 896*l.*

Charles Louis Giraud signed a memorandum acknowledging that he held the mortgage in trust for his father, *Jean Baptiste Giraud*. This mortgage had been made to the son, under the impression that the father, who was born in *France*, was an alien. It appeared, however, that *Jean Baptiste Giraud* came to *England* about the year 1798, and served, from the 1st of April, 1798, until the 24th of November, 1802, as an able bodied seaman on board a British ship of war, *The Arrogant*, this country being all that time at war with *France*.

Jean Baptiste Giraud died in 1860. Afterwards the mortgagors were desirous of paying off the mortgage and of obtaining a reconveyance, but *Charles Louis Giraud*, a mariner, having gone abroad in 1844 and not having been since heard of, this could not be done. A petition was thereupon presented, under the Trustee Act, by the parties beneficially interested under *Jean Baptiste Giraud's* will and by his executor, under which an order had been made, by the Master of the Rolls, in February, 1861, vesting the legal estate in *Louis Watbled* the executor.

It was afterwards discovered that *Watbled* was an alien, and an application was now (16th of November,

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Re  
GIRAUD.

1861) made, that another name might be substituted in the order in lieu of *Watbled*.

Mr. *Hemmings*, in support of the petition, argued, first, that under the 13 Geo. 2, c. 3, and 20 Geo. 3, c. 20, *Jean Baptiste Giraud* must be held to be a natural born subject; and secondly, that as the vesting order had been made under a mistake as to the nationality of *Watbled*, it might be now corrected.

Mr. *Wickens*, for the Crown, *contra*, argued that the provision in the act referred to only applied after the king's proclamation to that effect (13 Geo. 3, c. 3, s. 4), as to which nothing appeared on the evidence.

#### *The Master of the Rolls.*

I think the 4th section only applies to merchant ships, and I must hold that *Jean Baptiste Giraud* was not an alien. But I cannot make a variation in the existing order, except with the consent of the Crown.

Mr. *Wickens* said he had no authority to consent, on behalf of the Crown, to the alteration.

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Apr. 18, 20.

A petition was now presented to rehear the former petition and to vary the order, in the manner asked on the previous occasion.

Mr. *De Gex* and Mr. *Hemmings*, in support of the petition, argued that as the estate did not vest in the Crown until office found, *Page's Cases* (a), the former order

(a) 5 Coke's Rep. 52.

order, which had been made under a mistake, might be discharged and a proper person now appointed trustee in the place of *Charles Louis Giraud*.

1863.  
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*Re*  
GIRAUD.

Mr. Wickens, for the Crown, raised no further objection, but asked for his costs.

The Master of the Rolls discharged the previous order.

Note.—Reg. Lib. 1863 A., fol. 927.

### *Re CAMERON COALBROOK COMPANY.*

#### HUNT'S CASE.

ON the 2nd of September, 1848, *Ebenezer Hunt*, the holder of 190 shares in this company, transferred them to his brother *Gideon Hunt*, who already held 172 other shares. In December, 1849, *Gideon Hunt* (a dissentient shareholder) transferred all these shares to the *Cameron Company*.

In 1851, an order was made to wind-up the company, and the transfer to the company having been held to be invalid, see *Bennett's Case* (a), *Gideon* was put on the list of contributors for the whole 362 shares.

In January, 1863, the official manager took out a summons in Chambers to review the list of contributors, by substituting the name of *Ebenezer Hunt* in the place of *Gideon Hunt* for the 190 shares. *Ebenezer Hunt* was subpoenaed to attend before the Examiner

April 20.  
In 1848, A. transferred some shares in a company to B. In 1851 the company was ordered to be wound up. The Court refused, in 1863, to allow the official manager to contest the validity of the transaction, until he had laid a sufficient ground for it, by stating to the Court what information he had received on the subject, and when he first obtained it.

(a) 18 Beav. 339, and 5 De G., M. & G. 284.

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 CAMERON  
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Examiner to be examined as to the circumstances relating to the transfer of these shares; but he resisted, and the matter was adjourned into Court.

The *Solicitor-General* (Sir *R. Palmer*) and Mr. *Roxburgh* for the official manager. The transfer, as we are ready to prove, was a mere simulated one, and the name of *Gideon Hunt*, who was insolvent, was used as a mere mask to protect *Ebenezer* from liability. The consequence is, that the transfer to *Gideon* was void, and *Ebenezer Hunt's* name ought properly to be inserted on the list as a contributory, in lieu of *Gideon Hunt*. They referred to *Hyam's Case* (*a*); *Costello's Case* (*b*); *De Pass' Case* (*c*), said to have been compromised in the House of Lords.

Mr. *Selwyn* and Mr. *C. Swanston* for *Ebenezer Hunt*. It is fifteen years since the transfer was made and twelve years have elapsed since the winding-up order; it is now too late to object to the transfer, for whatever might have been the nature of the transaction originally, the lapse of time is now a bar to re-opening the matter. We therefore meet this case by an objection in the nature of a demurrer. Twelve years had elapsed in *Brotherhood's Case* (*d*); *Ex parte Bennett* (*e*); *Dr. Grady's Case* (*f*); *Straffon's Case* (*g*); *Shortridge v. Bosanquet* (*h*); *Blair v. Bromley* (*i*).

Three years after a transfer, the liability of a shareholder would cease as regards creditors, and a transfer made,

- |                                                                                     |                                                                                    |
|-------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| ( <i>a</i> ) 1 <i>De G., F. &amp; J.</i> 75.                                        | ( <i>f</i> ) 32 <i>L. J. (Ch.)</i> , 326.                                          |
| ( <i>b</i> ) 2 <i>De G., F. &amp; J.</i> 302.                                       | ( <i>g</i> ) 4 <i>De G. &amp; Sm.</i> 256, and<br>1 <i>De G., M. &amp; G.</i> 576. |
| ( <i>c</i> ) 4 <i>De G. &amp; J.</i> 544.                                           | ( <i>h</i> ) 16 <i>Beav.</i> 84, and 5 <i>H. of L. Cas.</i> 297.                   |
| ( <i>d</i> ) 31 <i>Beav.</i> 365; <i>affirmed</i> , 31<br><i>L. J. (Ch.)</i> , 861. | ( <i>i</i> ) 2 <i>Phil.</i> 354.                                                   |
| ( <i>e</i> ) 18 <i>Beav.</i> 339, and 5 <i>De G., M. &amp; G.</i> 284.              |                                                                                    |

made, even for the very purpose of getting rid of the liability, would be valid, unless it be shewn that the company was, at the time, notoriously in a state of insolvency. *Gideon Hunt* has all this time been recognized as the holder of these shares, and time is most essential where it is attempted to change a recognized ownership and transfer a liability.

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CAMERON  
COALBROOK  
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CASE.

### *The Master of the Rolls.*

I think that, after the length of time that has elapsed since the winding-up order was made, namely, eleven or twelve years, the official manager ought not to examine into a transfer which took place before that time, without some considerable ground for believing that he can disturb the arrangement; he ought to have some sufficient information on the subject, and ought not wantonly to commence an expensive litigation.

I shall, therefore, require the official manager to state to me what information he has received on the subject, and when he first obtained it. That being done, I am of opinion that *Ebenezer Hunt* cannot refuse to be examined, assuming the first condition to be satisfactorily complied with.

I am of opinion that he stands in this situation :—he abstains from giving any evidence and will not allow any to be given. I must therefore, as on demurral, make every presumption against him, and, assuming that the official manager satisfies me that he was justified in not coming here sooner, I shall then enter into the merits and have to consider whether the transaction ought to be held invalid. I cannot say that there may not

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Re  
CAMERON  
COALBROOK  
COMPANY.  
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CASE.

not be a fraudulent transfer which the company have a right to open at this distance of time.

I think, therefore, that the case must stand over, and if the official manager should satisfy me that there is a fair ground for further inquiry, I shall allow the case to proceed.

I agree that it has not been the practice to require this preliminary explanation on the part of the official manager, and no inquiry would have been necessary in this case if the winding-up order had been made in 1861 instead of 1851, for then I should at once have said "you may inquire into it." But when twelve years have elapsed, it is taken out of the ordinary rule. In such a case there ought to be something special to induce the Court to go into a transaction of so old a date, and I shall certainly make every reasonable and fair presumption in favor of the transaction after such a lapse of time.

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1863.

## GOULD v. GOULD.

April 30.

THE testator, by his will dated in 1829, devised and bequeathed his real and personal estate to trustees for his sister *Sarah Gould* for life, and afterwards on certain trusts for her children (exclusive of *William Gould* her eldest son).

By a codicil dated in 1834, the testator said "I give and bequeath unto my eldest nephew and *heir at law*, *William Gould*, the sum of 3,000*l.* He afterwards expressed himself as follows:—"And I direct that the making or publication of this my codicil shall not extend or be construed to extend to give to my trustees, for the benefit of my said sister, any freehold or copyhold estates or premises purchased by me since the date of my said will, but that (except as to the premises in *Petworth* hereinafter mentioned), the same estates and premises shall descend and go, as to my freehold estates to my heir at law, and as to my customary estates, to my customary heir, according to the custom of the respective manors whereof they may be holden."

The testator died in 1835, having, between the date of his will and codicil, purchased a copyhold estate called "*Cold Waltham*."

At the testator's death, his sister *Sarah Gould* was his heiress at law, and heiress according to the custom of the manor of which the copyhold was holden. But, on the supposition that his sister was excluded, *William Gould* was then his heir at law and *John Gould* was his customary heir.

By his will, a testator gave his real and personal estate to trustees, on trusts for his sister. By a codicil he gave a legacy to his eldest nephew, whom he called his "heir at law," and he directed that the codicil should not give to his trustees, for the benefit of his sister, any after acquired freeholds or copyholds; but that the same, as to freeholds, should descend to his heir at law, and as to customary estates, to his customary heir. At the testator's death, his sister was his heiress at law and customary heir. Held, that she was not excluded from taking by descent the after acquired copyholds.

The

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 GOULD
 v.
 GOULD.

The question was, whether, on the death of the testator, the copyhold descended on his sister *Sarah Gould* or on her son *William Gould*.

Mr. *Baggally* and Mr. *Kingdon*, for the Plaintiff, contended that the copyhold descended on the sister, as his customary heir, under the express words of the will. That, at all events, the heir was not to be excluded by surmise or doubtful expressions; *Hall v. Warren* (a); *Fitch v. Weber* (b).

Mr. *Osborne* and Mr. *Kay* in the same interest.

Mr. *Southgate* for a trustee.

Mr. *Selwyn contra* for *John Gould*. A testator may, if he pleases, put a glossary in his will, and say what he means by particular words. Here he expressly says, that he intends the codicil shall give no benefit to his sister in the freeholds and copyholds purchased since the date of his will, and also that he means his eldest nephew *William Gould* by the words "heir at law," thereby excluding his sister. *William Gould* would, therefore, have taken any freeholds purchased after the date of his will; and by the same reasoning the testator must have intended to exclude his sisters from the copyholds subsequently purchased and that they should descend on *John*.

In *Parker v. Nickson* (c), where a testator made *A. B.* heir at law of all his property, it was held that it amounted to a devise to him. He also cited *Hart v. Tulk* (d); *Baker v. Wall* (e); and see *Johnson v. Johnson* (f).

The

(a) 9 H. of L. Ca. 428.

(b) 6 Hare, 145.

(c) 1 De G., J. & S. 177.

(d) 2 De G., M. & G. 300.

(e) 1 Lord Raym. 185.

(f) 4 Beav. 318.

The Master of the Rolls.

I have no doubt as to the proper construction of this codicil.

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~~~~~  
GOULD  
v.  
GOULD.

Taking the latter part of the will first, the testator says my customary estates shall descend and go to my customary heir. His sister was his customary heir. There is no ambiguity about it, you could not make a more clear devise to her as customary heir. But I am told I am not so to consider it, and for this reason :— because he says the codicil shall not be construed to give the trustees, for the benefit of his sister, any after purchased estates, but that they shall descend. This means that the after purchased estates shall not be held in trust for his sister for life, with remainder to her younger children, but that they shall descend on his heir, and she is the heir. There is nothing inconsistent in this; if she had predeceased the testator, then *William Gould* would have taken the after acquired freehold property as the testator's heir at law and *John Gould* the customary property as his customary heir.

The next reason is, because he designates *William* as "my heir at law" in giving him a legacy, and it is said that because the testator has thought fit to call *William* his heir at law, it must therefore be inferred that he intended, if he could, to make *William* his customary heir, because he would have been his customary heir if he had been his heir at law. I should be making a will for the testator if I put such a construction on these words.

I am of opinion that the testator's sister took the copyhold estate acquired after the date of the will as the testator's customary heiress, and that it passed under her will.

1863.



March 9.

By a settlement, trustees were to raise 2,000*l.* for *A.* for life, with remainder to her children, with powers for maintenance, advancement "or otherwise," and in default of children the fund was given to *C.* A like sum was given to *B.* for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed, in respect to the 2,000*l.* given to *A.* and her children, "and otherwise in like manner, to all intents and purposes, as if such trusts and provisions were there fully repeated:" Held, that this included the gift over to *C.* and that on the death of *B.* without children *C.* was entitled to the second sum of 2,000*l.*

*Re SHIRLEY'S TRUSTS.*

BY a settlement dated in 1821, trustees were, out of the trust funds, to raise 2,000*l.* and pay the income to *Isabella Ann Culverhouse* for life, and after her decease in trust for her children equally at twenty-one or marriage, with benefit of survivorship and accrue. Power was given to the trustees to apply the interest "towards the maintenance and education or otherwise for the benefit and advantage" of the children during their minority, and to apply one-half of the capital of the presumptive shares, "for or towards the putting or placing of any or either of the said children to any business, profession or employment or otherwise for his, her or their preferment or advancement in the world." And in case there should be no child of *Isabella Ann Culverhouse*, &c., &c., then in trust to transfer the trust moneys, funds and securities to *Thomas Shirley*.

The trustees were to raise another sum of 2,000*l.*, of which they were to pay the income to *Mary Shirley* for life. The deed proceeded thus:—"And after her decease, then for the benefit of all and every the child and children of her the said *Mary Shirley*, to be a vested interest or vested interests at such and the same age, day or time, and with such and the like benefit of survivorship and accrue between or among them, in the event of the death of any one or more of them, and with the like provisions for their maintenance and education, and also for their advancement and otherwise as

as hereinbefore expressed, declared and contained with respect to the sum of 2,000*l.* hereinbefore directed to be invested for the benefit of the said *Isabella Ann Culverhouse* and her child and children *and otherwise* in like manner to all intents and purposes as if such trusts and provisions were here fully repeated."

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—  
*Re  
SHIRLEY's  
Trusts.*

In 1862, *Mary Shirley* also died without having had children, and the fund having been paid into Court, the purchasers under *Thomas Shirley* presented a petition for payment to them of the 2,000*l.* The question was, whether *Thomas Shirley* took this fund under the terms of reference contained in the settlement.

Mr. *Baggallay* and Mr. *Prendergast*, for the Petitioners, argued, that the intention was to repeat exactly the trusts relating to Mrs. *Culverhouse's* legacy in the gift to Mrs. *Shirley*, including the gift over to *Thomas Shirley*.

Mr. *C. Hall*, contra. The trusts of *Mary Shirley's* 2,000*l.* do not embrace the ultimate trust in favor of *Thomas Shirley*. The objects of the trust are *Mary Shirley* and her children alone; this is shewn by the terms and frame of the clause. The terms of reference relate alone to them, and the words "and otherwise" refer to the clauses of maintenance and advancement, in which the same expression, "or otherwise," is used, and not to *Thomas Shirley*.

Mr. *Hemmings* for another Respondent.

*The MASTER of the ROLLS.*

I think the Petitioners are entitled to the 2,000*l.*, and that I should be striking words out of the settlement if  
I held

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*Re*  
SHIRLEY'S  
TRUSTS.

I held otherwise. I must incorporate in the trusts of the second sum the provisions contained in the first, as to maintenance *and otherwise* as thereinbefore expressed, &c., with respect to the first 2,000*l.* directed to be invested for the benefit of Mrs. *Culverhouse*, her children *and otherwise*. I am of opinion, that unless I change the words "or otherwise" into "or otherwise for them," that is for the children, it includes all the previous provisions, which are to be fully repeated in the second series of trusts.

I cannot agree that the words "maintenance, education and advancement" do not cover everything that concerns the children, and these words are repeated in both bequests; but in addition to them the bequest in favour of Mrs. *Shirley* and her children contains the words "and otherwise." It is to be invested for the benefit of *Mary Shirley* and her children *and otherwise*, that is for some other person, and that person must be *Thomas Shirley*.

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1863.

*In re THE MARYPORT &c. RAILWAY ACT.**Ex parte THE EARL OF LONSDALE.**Feb. 28.  
Mar. 14.*

**P**ORTIONS of the settled estates of the Earl of *Lonsdale* were taken by three distinct railway companies, by virtue of their compulsory powers.

*The Maryport &c. Railway Company* took property of the value of 864*l.*, *The South Durham &c. Railway Company* of the value of 845*l.* and *The Eden Valley Railway Company* to the value of 3,912*l.* These purchase-moneys had been paid into Court.

Afterwards, the two latter railway companies were dissolved, and the property, rights and liabilities were transferred to *The Stockton and Darlington Railway Company*, into which they merged.

An eligible purchase having been found for the re-investment of 5,127*l.*, part of the fund in Court, a petition was presented by the Earl of *Lonsdale* to carry it into effect.

**Mr. Wickens** for the Petitioner.

**Mr. De Gex**, for *The Stockton and Darlington Railway Company*, submitted that the costs ought to be borne equally between the railway companies; *Ex parte The Bishop of London* (a).

**Mr. C. Hall**, for the *Maryport &c. Railway Company*, argued

(a) 2 *De G., F. & J.* 14.

When parts of an estate are taken by several railway companies, and the united compensation moneys are invested in one purchase, the ordinary costs of re-investment are to be borne by them equally, and not in the proportions of their respective compensation moneys so re-invested.

Portions of an estate were taken by three companies, two of which afterwards merged into one company: *Held*, that the amalgamated companies must bear two-thirds of the costs of a joint re-investment.

1863.

*In re*  
**THE MARY-**  
**PORT, &c.**  
**RAILWAY**  
**ACT.**  
*Ex parte*  
**EARL OF**  
**LONSDALE.**

argued that the rule did not apply here, where the amount of purchase-money, in the one case, so much exceeded that in the other.

*The MASTER of the ROLLS.*

I must follow the case cited, and hold that the costs ought to be borne equally, except the *ad valorem* stamps.

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This case was mentioned again, a question having arisen, in drawing up the order, whether *The Stockton and Darlington Railway Company* ought to bear half or two-thirds of the costs.

Mr. *De Gex* argued that, after the two companies had become united in *The Stockton and Darlington Railway Company*, one petition would have been sufficient for the investment of the money belonging to the two companies, and that therefore *The Stockton and Darlington Railway Company* was liable to pay only half of the costs.

Mr. *C. Hall* was not heard.

*The MASTER of the ROLLS.*

The only liability of each company was, to pay the costs of the reinvestment of its own compensation money. But if the contention of the *Stockton Railway* were to prevail, the effect would be this :—suppose ten railway companies were to take portions of the same estate, and that the whole compensation were to be invested in one purchase, then each railway company would

would be liable to bear one-tenth of the costs ; but if nine of them were united, then the remaining company instead of paying one-tenth of the costs would have to bear five-tenths. Thus by the union of the nine companies a liability to pay four-tenths of the costs would be shifted on another company.

The costs must be borne in thirds.

### LEIGH v BIRCH.

1863.

*In re*  
THE MARY-  
PORT, &c.  
RAILWAY  
Act.

*Ex parte*  
EARL OF  
LONSDALE.

April 15.

*JOHN B. Birch* and *Eugenius Birch* carried on the business of civil engineers in partnership.

*John B. Birch* died intestate, in June, 1862, and in November, 1862, letters of administration were granted to his sister *Mrs. Grier*.

The bill in this case was filed by his next of kin against *Eugenius Birch* and *Mrs. Grier*, and as amended it alleged as follows :—

“ Immediately on the death of the intestate, the Defendant *Eugenius Birch* took possession of all the property of his brother, and has remained ever since and still is, in such possession, whereby Plaintiffs submit that he has constituted himself executor *de son tort* and is liable to account in this Honorable Court.”

“ In December, 1860, the intestate became of unsound mind and was placed at a private lunatic asylum by the Defendant *Birch*, and the intestate continued there until his death.”

“ The

A bill was filed by the next of kin against *A. B.*, the administratrix, and *C. D.*, who was the partner and executor *de son tort* of the intestate, for the administration of the estate and to take the partnership accounts :—  
*Held*, that *C. D.*, who had not demurred, was bound to set out the partnership accounts.

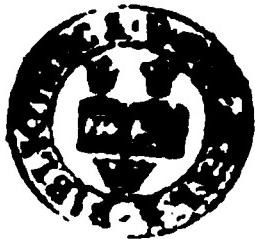
1863.



LEIGH

v.

BIRCH.



"The said partnership was never dissolved and continued up to the death of the intestate, and since his death the said business has been carried on by Defendant *Birch* with the assets of the said partnership, which has never yet been wound up or settled."

The bill prayed a declaration that *Eugenius Birch* was liable to account as executor *de son tort*, and that an account might be taken of the partnership business to the present time. It also prayed for an account and administration of the personal estate, as against both Defendants.

The Plaintiffs, by their interrogatories, amongst other things, required *Eugenius Birch* to set forth the partnership accounts.

. *Eugenius Birch* by his answer said, there was not any agreement between myself and *John B. Birch* as to the period for which the partnership between us should be carried on, so that the partnership could, as I submit, be dissolved at any time by either of us ; yet, during our partnership, it was always understood between us (and the partnership business was carried on on that footing) that *John B. Birch* deceased should receive and pay the moneys receivable and payable in respect of the partnership business, and should attend to and keep the accounts of our partnership transactions. However he did not make proper entries in the partnership book of such transactions, and he neglected to keep the accounts as he ought to have done, and in fact the accounts of the partnership were in such a confused and unintelligible state, that shortly before the commencement of the illness of *John B. Birch* deceased, which ended in his death, the partnership books and documents were handed over to Mr. *Robinson*, an accountant, to make out

out therefrom the best statement he could. However I believe that he has, in consequence of the imperfect state of the entries in the books, been unable to make out any satisfactory statement.

He said, that when *John B. Birch* was removed to a lunatic asylum, he believed that he had become permanently insane, and he therefore considered the partnership determined, and that he thenceforth carried on the business on his own account. However, if the partnership was not in fact dissolved, then, inasmuch as a balance would, upon taking the accounts, be found coming to him, the Defendant, he should be a creditor upon the estate of *John B. Birch*. He said, that although since his death the business of a civil engineer had been carried on by him, it had not been carried on by him "with the assets of the said partnership, for there were none." That it was the fact that the partnership accounts had never been wound up or settled, but if the accounts were properly taken or could be properly taken (having regard to the neglect of the said *John B. Birch* to keep the partnership accounts as he ought to have done) there would, as he believed, be a balance coming to him the Defendant.

He said "I submit that the Plaintiffs are not entitled, in this suit, to require me to set forth the accounts referred to in the 3rd, 4th and 5th interrogatories to their amended bill or any of them, and in fact I am, under the circumstances herein appearing, unable to do so."

The Plaintiffs took exceptions to the answer for insufficiency.

Mr. *W. W. Mackeson* in support of the exceptions.

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LEIGH

v.

BIRCH.

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Lyon

v.

Birch.

The Defendant having answered must answer fully. Here *Eugenius Birch* is accountable as executor *de son tort* (a); and as the lunacy did not terminate the partnership; *Besch v. Frolich* (b); he is accountable to the infant Plaintiffs for the share of the intestate in the business. The accounts of the intestate's estate and of his share in the business may, as against this Defendant, be properly united in one bill; *Willett v. Blanford* (c); *Thomas v. Rees* (d).

Mr. *Tripp* *contra*. By the General Order XV, Rule 4, a Defendant is "at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demur." Here there is no privity between the Plaintiffs and the Defendant; the bill is demurable, and therefore the Defendant may object, by his answer, to set forth the partnership accounts and other matters. The exceptions ought to be overruled or stand over to the hearing as in *Davis v. Earl of Dysart* (e).

The Master of the Rolls.

I think these exceptions must be allowed. The general rule is very plain; if a Defendant demur to the bill, he relieves himself from the necessity of answering at all; but if he answer, he must answer fully. The General Order of the Court which has been referred to does not apply to this case, but only to those cases where, though the Defendant answers, he has a particular right to object to answering a particular question; as, for instance, if it would render him liable to penalties

or

- (a) 1 *Phillips*, 152.
- (b) 1 *Phillips*, 172.
- (c) 1 *Hare*, 259.

- (d) 1 *Jur. (N. S.)* 197.
- (e) 21 *Beav.* 124.

or where a solicitor is required to divulge the secrets of his client; these are questions which the Plaintiff has no right to ask, and which it was intended to be protected by the general order. It does not mean that a Defendant can avoid answering fully, by saying, "I might have objected by demurrer to the general relief prayed." This must be done within a particular time and at a proper stage of the cause.

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Leigh

v.

Birch.

I am of opinion that these interrogatories are not even substantially answered; but whether the Plaintiffs can obtain any benefit from pressing for a full answer to these matters is very doubtful. Although I am much opposed, generally, to exceptions to answers, still I am bound to say that here the Defendant has not answered.

Exceptions allowed with costs.

RAIKES v. RAIKES.

Apr. 30.

UNDER the marriage settlement of *Thomas Raikes*, A tenant for life, with power to appoint new trustees, parted with the whole of his interest in the settled property. He afterwards appointed two improper persons to be trustees. Upon a bill to remove such trustees, and also to administer the trusts and to make

The settlement contained a power enabling *Thomas Raikes*, the tenant for life, to appoint new trustees.

Robert Raikes, the surviving trustee, with the concurrence of the tenant for life, sold out and misappropriated the trust funds.

In

the tenant for life pay the costs:—*Held*, on demurrer by the tenant for life, that he had properly been made a party.

1863.



RAIKES

v.

RAIKES.

In June, 1861, the surviving trustee and the tenant for life, who were partners, stopped payment, and under the provisions of the Bankrupt Law Consolidation Act, 1849 (*a*), they presented a petition for arrangement under the control of the Court of Bankruptcy. That Court confirmed a proposal, whereby their joint and separate estates were vested in four trustees for the benefit of their creditors.

In 1862, *Thomas Raikes* was requested to appoint two new trustees; this he agreed to do, but insisted on appointing two insolvent persons, and notwithstanding the remonstrances of the other parties beneficially interested, he appointed them accordingly, and the trust funds had been assigned to them.

Under these circumstances, this bill was filed, by the parties beneficially interested, against the new trustees, the tenant for life, and the trustees of the deed of arrangement, praying that the new trustees might be removed, that the trusts of the settlement might be performed, that the life interest of *Thomas Raikes* might be impounded to answer the breach of trust, and that the tenant for life and the new trustees might pay the costs of this suit.

To this bill, *Thomas Raikes*, the tenant for life, demurred for want of equity.

Mr. Hobhouse and *Mr. Miller* in support of the demurrer. The tenant for life is not a proper party to this suit; having parted with his whole estate, his power is gone; *Lewin on Trustees* (*b*). Even if he has a discretionary

(*a*) 12 & 13 Vict. c. 106, repealed to a great extent by the 24 & 25 Vict. c. 134, Schedule G.

(*b*) *Page 433 (4th edit.)*

a discretionary power; *Sugd. Powers (a)*; still a person having a mere power and no interest cannot be made a party, and there are trustees *de facto* who represent the estate. It will be said, that the bill prays that he may pay the costs; but he is not a solicitor, and the cases do not apply, and besides he is relieved from all personal liability by the Bankrupt Act.

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They also referred to *Hole v. Escott (b)*.

Mr. Selwyn and Mr. E. Macnaghten, in support of the bill, were not called on.

#### *The Master of the Rolls.*

I think this demurrer must be overruled. The bill states, that the Defendant claims the power to appoint new trustees, and that he has exercised it in favor of two gentlemen, who were improper persons to be appointed trustees.

He now comes forward and says, that the claim of the persons so appointed cannot be supported in law, and that the appointment is wholly void, that when the cause comes on to be argued in Court, it will be found that he has no such power, and that the persons whom he has appointed, in defiance of every remonstrance, are not trustees at all.

But the trust property is vested in them, and this by means of his act, and it must be got out of them. How is it possible for him to argue, that he is not a proper party when he makes such an assignment and defends it by such arguments.

I am

(a) *Page 601 (8th ed.)*

(b) *2 Keen, 444, and 4 Myl. & Craig, 187.*

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I am of opinion, that, if he claims, as the bill alleges that he does, a right to appoint new trustees, this is a claim which must be determined by the Court. It is also a matter of urgent importance, for one of the newly appointed trustees has refused to act, and if the other should die, questions may arise immediately requiring the intervention of trustees, though pending the suit no new trustee can properly be appointed.

The bill charges, that he has occasioned the suit, and that, in spite of the remonstrances of the Plaintiffs, he has insisted on appointing improper persons to be trustees, and that the trust property has been conveyed to them, and it asks that he may pay the costs. It is obvious that there is a grave question to be argued, and that the Court may well say, at the hearing, that he has occasioned costs which he must pay.

I must overrule the demurrer.

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### *In re JESSOP.*

Apr. 16.

A second mortgagee presented a petition to tax the bill of costs of the first mortgagees' solicitor, which had been paid out of the produce of the sale of the mortgaged estate. Held, that the first mortgagees must be served with the petition.

**A** MORTGAGED estate was sold by Messrs. *Thorp & Barrett*, the first mortgagees, under a power of sale, and Mr. Jessop acted as the solicitor in the matter. The purchase was completed in *March*, 1862, and Mr. Jessop, having delivered his bill of costs amounting to 69*l.* 15*s.* 9*d.*, retained the amount out of the purchase-money with the sanction of his clients. There remained a surplus of 82*l.*, after payment of the principal, interest and costs of the first mortgagees.

Within a twelvemonth, the second mortgagee presented a petition for the taxation of the solicitor's bill, which

which specified items of alleged over-charge (*a*). The petition was served on the solicitor alone, and it was objected that no taxation could take place in the absence of his real clients, the first mortgagees.

*Mr. Pemberton*, in support of the petition, cited *In re Drake* (*b*).

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### *The Master of the Rolls.*

You must serve the first mortgagees. The solicitor may say, "I have been paid by my clients, and I will not attend the taxation to defend one single item of my paid bill."

In the case of residuary legatees, where the executor has paid his solicitor's bill in full, but does not account with residuary legatees for two years afterwards, it is clear the residuary legatees could not tax the paid bill as against the solicitor. But when the residuary legatees and the executor come to a settlement, the residuary legatees may say that the bill is very improper and they may tax it as against the executor, who will be disallowed the amount taxed off, which, if he had taxed the solicitor's bill, he need not have paid; but the residuary legatees cannot recover this amount as against the solicitor.

The petition must stand over to serve the mortgagees.

(*a*) 6 & 7 Vict. c. 73, s. 39.

(*b*) 22 Beav. 438.

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*A.* agreed to sell to *B.* a piece of land. *A.* was to make a new road, of which *B.* was to have the use, and *B.* was to expend 3,000*l.* in building a house on the property. The contract was to be completed on the 1st of August, interest was payable if not completed on that day, and time was declared to be of the essence of the contract as regarded the making of objections to the title. The contract not having been completed, the vendor, on the 4th of August, gave notice that he rescinded the contract unless completed within a month. At this time, there only remained two substantial requisitions, and which

the vendors were taking steps to comply with. *Held*, first, that time was not of the essence of the contract; secondly, that the notice was not reasonable; and thirdly, that there was nothing in the nature of the contract which prevented its being specifically performed.

**WELLS v. MAXWELL. (No. 1.)**

ON the 26th of *May*, 1862, the Plaintiff and Defendant signed an agreement, whereby the Defendant agreed to purchase from the Plaintiff a portion of the Worcester Park estate, with the right of using the road thereinafter agreed to be made by the Plaintiff, for 2,000*l.*, "to be paid on the 1st day of *July* next," "on a good title being shewn," and "on having a conveyance." The 2nd condition of sale provided, that the Plaintiff "shall, within ten days from the date, deliver to the Defendant an abstract of title, and make a good road as specified on the plan. The 3rd provided, that the Defendant should "make his objections and requisitions, if any, in respect to the title," within "twenty-one days from the delivery of the abstract," "and all objections and requisitions which shall not be made within such twenty-one days shall be considered as waived, and, in this respect, time shall be considered as of the essence of the contract." The 4th provided, "that on payment, on the said 1st day of *July*," of the 2,000*l.*, the Plaintiff should execute and procure to be executed, by all necessary parties, a proper conveyance. The 5th was as follows:—That the said purchase shall be completed on the day and at the place hereinbefore mentioned or to be appointed as aforesaid, and *William Maxwell* shall, on that day, be let into the possession of the said premises, and, up to that day, all outgoings shall be discharged by the said

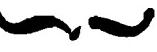
said *William Wells*." "6th. That if, from any cause whatever not occasioned or arising from the default of *William Wells*, the said purchase shall not be completed on the said 1st day of *July*, *William Maxwell* shall pay interest, after the rate of 4*l. per cent. per annum*, on the said sum of 2,000*l.* from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession of the said land, and the rents and profits (if any) from the said 1st day of *July* until the day of the completion of the purchase."

"11th. *William Maxwell* doth hereby agree, by way of contract, but which is not to form part of the said conveyance, that he will, within eighteen calendar months from the execution of the conveyance to him, at his own cost, erect and build and complete fit for habitation and use, upon the land hereby agreed to be sold, and with the best materials and workmanship of every description, one messuage or dwellinghouse, with the necessary outbuildings thereto (and either with or without coach-houses, greenhouses and forcing pits), and will fence the said land and expend in the erection of such messuage and dwellinghouse and outbuildings the sum of 3,000*l.* sterling at least." 12th. Mr. *Maxwell* agreed to pay to Mr. *Wells* 50*l.* towards the expense which should be incurred by him in forming a road of which he was to have the right of user.

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On the 4th of *June*, 1862, the solicitor of the Plaintiff sent to the solicitor of the Defendant the abstract of title. On the 24th of *June*, 1862, the Defendant's solicitor delivered his requisitions on the title, which were answered on the 7th of *July*, 1862. On the 9th of *July*, 1862, the Defendant's solicitor sent further requisitions on title, which were answered on the 22nd of *July*, 1862. On the 4th of *August*, 1862, the Defendant's solicitor sent to the Plaintiff's solicitors a notice, requiring them

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them within one month to comply with the nine remaining requisitions upon the title, which the notice specified, and it proceeded thus:—"and if you refuse or neglect to comply with the notice, within the time aforesaid, I do hereby determine and put an end to the before-mentioned contract."

These requisitions were complied with except the 22nd and 11th, which were of this nature:—the 22nd required satisfaction to be entered of an order, made by this Court on Mr. *Fuller*, a former proprietor of the property and a contributory of a public company, on the 3rd of *August*, 1859, to pay the sum of 900*l.* This sum had, in fact, been paid, but satisfaction could not then be entered up, as the official manager was travelling on the Continent, and the Plaintiff's solicitors were unable to communicate with him so as to obtain his signature.

The 11th requisition related to an order of the Inclosure Commissioners, under which, the whole of the *Worcester Park* estate had been charged with the annual sum of 195*l.*, payable for thirty-one years to the *General Land Drainage and Improvement Company*. The Defendant required that the portion purchased by him should be discharged from this incumbrance.

The Plaintiff endeavoured to comply with this requisition, and negotiated for the discharge of the lands purchased from its proportion of the charge; but ultimately, the owners of the charge declined to release the lands purchased, on the ground that they were advised by their counsel that to do so would endanger the security over the rest of the estate. The Plaintiff, in consequence, entered into a negotiation for the purchase of the whole rent-charge, and at length succeeded, but not until after the institution of this suit.

A correspondence

A correspondence subsequently took place between the parties; the Defendants always insisted on their notice, and the Plaintiff insisted on the contract being performed. The two requisitions not having been complied with, the Defendant, in *December*, 1863, commenced an action for damages against the Plaintiff, and on the 8th of *January*, 1863, the Plaintiff filed this bill for a specific performance of the contract.

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Mr. Selwyn and Mr. Jessel for the Plaintiff. In equity the time appointed for the completion of a contract is not, as at law, of the essence of the contract; *Parkin v. Thorold* (*a*). In *Roberts v. Berry* (*b*) it was held that the time specified for the delivery of the abstract was not of the essence of the contract. If there be an unreasonable delay on the part of the vendor in completing his title, the purchaser may, however, require the contract to be completed within a fixed time, and in default, he is entitled to rescind the contract. The time so limited must be reasonable, and such as to give the vendor a fair opportunity of removing the difficulties. In *Heaphy v. Hill* (*c*) there was a delay of two years, and in *Watson v. Reid* (*d*) a delay of a year in filing the bill after the abandonment of the contract, and in *Southcomb v. The Bishop of Exeter* (*e*) there was a delay of eleven months. In *Nott v. Riccard* (*f*) a notice to rescind, if the act were not done within a fortnight, was held sufficient; but there the vendor positively refused to comply, and therefore no extension of the time would have secured the performance of the act required to be done.

In this case, where there were only two requisitions remaining,

(*a*) 16 *Beav.* 59.  
 (*b*) 16 *Beav.* 31, and 3 *De  
G., M. & G.* 284.  
 (*c*) 2 *Sim. & St.* 29.

(*d*) 1 *Russ. & Myl.* 236.  
 (*e*) 6 *Hare*, 213.  
 (*f*) 22 *Beav.* 307.

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remaining, and which the vendors were doing all in their power to comply with, and, therefore, the time limited by the Defendant was neither sufficient nor reasonable.

Mr. *Baggallay* and Mr. *Batten* for the Defendant. Notwithstanding the old authorities, it is now perfectly settled that time may be of the essence of the contract; *Seton v. Slade* (a); *Levy v. Lindo* (b). Time may be of the essence of the contract, either by express stipulation or from the nature of the subject of the contract, or be made so by the delay of the vendor in completing it. Here the 5th condition expressly provides that the contract shall be completed on the 1st of *July*, and the object of the Defendant was to erect a house on the land for a residence, which, of itself, made time essential. In *Levy v. Lindo* (b) Lord *Eldon* observed that Lord *Thurlow* had said that time was not of the essence of the contract, but that he (Lord *Eldon*) had deviated from that rule, and he then proceeds, "and there is no species of purchase to which the reason of this deviation is more applicable than to that of a *house for residence*." With such an object delay might render the purchase useless; — *v. White* (c). Here one month's notice was reasonable. In *Benson v. Lamb* (d) the time limited by the notice was ten days, and in *Macbryde v. Weekes* (e) it was one month. The Defendant has, therefore, effectively put an end to the contract.

The Plaintiff created unnecessary delay in paying off the whole rent-charge, which was not completed until the 16th of *February*, 1863. He ought to have got it apportioned under the 12 & 13 Vict. c. 100, ss. 11, 12.

But, secondly, this is not such a contract as the Court

(a) 7 *Ves.* 265.(b) 3 *Mer.* 84.(c) 3 *Swan.* 108, n. (a).(d) 9 *Beav.* 502.(e) 22 *Beav.* 533.

Court can specifically perform. It cannot compel the Defendant to build a house or the Plaintiff to make a road; *Storer v. The Great Western Railway Company* (a); *Flint v. Brandon* (b); *Lane v. Newdigate* (c); *The South Wales Railway Company v. Wythes* (d). A contract must be specifically performed in its entirety and not in part, and if there be any portion of it which the Court cannot specifically enforce, the whole fails; *Hills v. Croll* (e); *The South Wales Railway Company v. Wythes* (f); *Ogden v. Fossick* (g).

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*Mr. Selwyn* referred to *Sanderson v. The Cockermouth and Workington Railway Company* (h).

*The Master of the Rolls* (without hearing reply) said :

I think the Plaintiff is entitled to a decree for the specific performance.

In the first place, upon the first question which has been principally argued, whether time is of the essence of this contract, I am of opinion that it is not. I do not find any passage in this contract which limits a time for the performance of the contract. It is to be assumed that the parties expected that the contract would be performed on the 1st of July, but there is no agreement that either party should be at liberty to repudiate it if it were not performed on that day. Lord Thurlow held, that time could not be made the essence of the contract in ordinary cases of purchases; but that doctrine has been completely overruled since that time,

and

- (a) 3 Railw. Cas. 106.
- (b) 8 Ves. 159.
- (c) 10 Ves. 192.
- (d) 1 Key & J. 186.

- (e) 2 Phill. 60.
- (f) 1 Kay & J. 186.
- (g) 32 L. J. (Chanc.) 73.
- (h) 11 Beav. 497.

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and there can be no doubt that time may now be made of the essence of the contract, but it requires a distinct and express stipulation for that purpose. Here, so far from finding any agreement that the contract shall be completed by the 1st of *July*, it appears to me that the contract itself provides for the possibility of its not being completed by that time, for it states, in the 6th clause, that if, from any cause whatever, not occasioned by the default of the Plaintiff, the purchase should not be completed by the 1st of *July*, not that the contract shall be at an end, but that the Defendant shall pay interest from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession of the land and the rents from that day until the day of completion of the purchase. In fact, there is not a word said as to time in the contract, except in the 2nd and 3rd clauses, which provide that the abstract shall be delivered within ten days, and that the objections to the title shall be delivered within twenty-one days from that period, and if not, then that all the objections to the title shall be considered as waived, and that, in this respect, time shall be considered as of the essence of the contract. Why does the contract say "in this respect" if it was meant that time should be of the essence of the contract in every other respect?

This, therefore, is distinctly a case in which, in my opinion, no time whatever is limited for the performance of the contract. But if it had been, and if, by the terms of this contract, the 1st of *July* had been the time limited for the performance of the contract, it has been clearly waived, because it was not until the 4th of *August* that notice was given to rescind the contract, if certain things were not done within one month. There had been a long correspondence between the solicitors of the

the vendors and the solicitors of the purchaser from the 1st of July down to the 4th of August, when this notice was given.

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I am then told that though time is not specified to be of the essence of the contract, yet the character of the contract or the subject matter of the purchase may make it so. This undoubtedly is so, and if the property sold is perishable by the lapse of time, or if the subject of the contract is a matter which has a peculiar value in the mercantile market, such as mines and the like, which may vary from time to time, then, no doubt, time may be of the essence of the contract, although it is not so specified. But nothing of that sort exists here, the only thing that is alleged is, that the property was wanted for a residence.

The case of *Levy v. Lindo* (a) was referred to, in order to establish the proposition, that where a person purchases a house for the purpose of a residence, it may be assumed that time is of the essence of the contract. But that was a very different case, that was the purchase of an existing house, which the purchaser wished to go into immediately, and it was pointed out, that if the house remained untenanted until the performance of the contract, it would become seriously impaired. Here, so far as appears from the contract, the building of the house within eighteen months would be for the benefit of the vendor and not of the purchaser. It is an onerous contract by which the purchaser binds himself to build a house within eighteen months for the benefit of the vendor, which is the ordinary course when a man takes a building lease of a plot of land. Therefore the case cited does not apply, and I see nothing in this case, either in the nature of the property sold or in the terms

(a) 3 Mer. 84.

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terms of the agreement, which makes time of the essence of the contract.

The only question then is, whether, in that state of the case and considering the communications which were going on between these parties down to the 4th of *August*, the notice then given was a sufficient and effective notice. It appears that certain requisitions had been made, and, at that time, there were only two requisitions which had not been answered. I adopt the distinction between answering a requisition and complying with a requisition. For instance, if the requisition be, that the vendors do shew in whom a charge on the estate is vested, and that such person will join in the conveyance, an answer that the charge is vested in *A. B.*, and that he will convey, is a sufficient answer to the requisition, but not a compliance with it; for the compliance only takes place when *A. B.* joins in the conveyance. It is a question of conveyance, and not of title, and the requisition is only complied with when *A. B.* joins in the conveyance and discharges the land from his charge upon it.

These were the two remaining requisitions, viz., the 11th, which related to the release of the land from the drainage charge, and the 22nd, which related to an order of this Court making a call upon the former proprietors of the lands for 900*l.* in respect of a company which was being wound up. I treat them both as substantial objections. Now what takes place is this:— On the 25th of *August*, the solicitors of the vendor send a notice to the solicitor of the purchaser, in which they state, “we have a certified copy of the order which we are ready to produce to you. The vendor is taking the necessary steps to get the land agreed to be sold to Mr. *Maxwell* discharged from the liability under this order,

order, but as we have, of course, no controul over the movements of the commissioners we cannot undertake to effect it within the time limited by Mr. Maxwell's notice. The draft declaration of Mr. Cuff is sent herewith for perusal. Messrs. *Eyre & Lawson* have undertaken to get satisfaction of this *lis pendens* entered. The 900*l.* has been long since paid to the official manager. The vendor is advised that, except as to No. 11, which will be effected without any delay, he has now *complied* with all the purchaser's requisitions, and he will insist on the contract for sale being fulfilled by Mr. Maxwell." I think that strictly this notice ought not to have said "complied with," but "answered."

An answer is sent to that saying, "that Mr. Maxwell will adhere strictly to the notice he has given." On the 6th of *September*, two days after the time had expired, the vendor's solicitors wrote, saying, "we send copy letter received from Messrs. *Eyre & Lawson*, which will explain why satisfaction has not been entered to the *lis pendens* by Dr. *Fuller*, and which we presume will be satisfactory. The general drainage charge in respect of the piece of land purchased by your client will also be released, but we have not yet quite arranged whether the parties in whom it is vested will join in the conveyance to your client, or whether they will wish us to get the whole charge released; in the latter event, we shall probably take a transfer of their charge under the Drainage Act to the first mortgagees. We believe the above comprise all the remaining requisitions in your notice to Mr. *Wells*."

Here was a complete answer that the vendor's solicitors had done everything that was required to be done, and that everything would be complied with and a complete title made.

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The answer to that is, that the Defendant "will adhere strictly to his notice, and as that has not been complied with he will treat the contract as at an end." No further communications take place between the parties, but the Plaintiff's solicitors are employed in the meantime, during the long vacation, in taking the proper steps necessary for complying with these two requisitions. The action is brought on the 1st of *December*, and then the parties are put at arm's length. Notice is given that the Plaintiff will insist on his contract, and this bill is filed in *January*, 1863.

The question is whether, in that state of circumstances, a month was a reasonable time to give for complying with the requisitions and making the conveyance. I am of opinion that it was not. It is clear that I should be overruling the case of *Parkin v. Thorold* (*a*), which was confirmed by the Lords Justices and has received the high sanction of Lord *St. Leonards*, if I were to hold that, in that state of circumstances, while the matter was going on, one party could say to the other "you shall complete this within a month or else we will have nothing more to do with the contract." The cases of *Nott v. Riccard* (*b*) and *Benson v. Lamb* (*c*), which were cited, are totally different cases.

I am therefore unable to say that this is a case in which time is of the essence of the contract, or that the parties had a right to make it so, or to hold, that by reason of the non-compliance or negligence of the vendor, the Plaintiff was entitled to say "unless you do something effectual for the purpose of removing these objections within one month, I am entitled to put an end to the contract."

That

(*a*) 16 *Beav.* 59.  
(*b*) 22 *Beav.* 307.

(*c*) 9 *Beav.* 502.

That being my opinion upon the question of time, I think the other objection is one which it is impossible to support, namely, that this is a contract which this Court will not enforce. Without referring to any of the decided cases, of which there are several similar to this, *Storer v. The Great Western Railway Company* (*a*) and *Sanderson v. The Cockermouth Railway Company* (*b*) are clearly instances in which that has been done, and there is nothing more common and ordinary. If the contention of the Defendants were to prevail, it would amount to this:—that whenever a man enters into a contract for the sale or purchase of a piece of land, and there is anything to be done by either party by way of easement or by way of accommodation to the other, this Court cannot specifically enforce the contract. I am of opinion that this is not the rule of this Court, and that it is perfectly distinct from a simple tradesman's contract between *A. B.* and a builder to build him a house, or as between *A. B.* and a roadmaker to make him a road, which rest upon totally different considerations. It is suggested that no means exist by which I could enforce it. The Court has many modes of enforcing it; but the simplest mode is this:—if the vendor refuses to perform it, I should allow the purchaser to make the road, and allow him to deduct from the purchase-money the proper amount of expenses for making it. This would be a very simple and effectual way of completing the contract on his part. Undoubtedly if this were a contract which depended upon the fact of the road being made, and if it were a condition precedent that there should be no contract unless the road were made, then other considerations would arise; but, upon the construction of this contract, I am of opinion that such is not the effect of it,

but

(*a*) 3 *Railw. Cas.* 106.

(*b*) 11 *Beav.* 497.

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but that the effect of it is simply that as a part or as a condition of the contract the Defendant is entitled to have the road made.

What I propose to do upon that part of the case is this :—I think I could not come to a satisfactory conclusion, without some further evidence upon the subject, that the road has been completed to such an extent as is reasonably fair, having regard to the contract between the parties ; but I will require the Plaintiff to undertake to do this within some reasonable time before the conveyance is executed, either to the satisfaction of the Defendant or of some surveyor to be appointed by the Court. There must be a decree for the specific performance of the contract, and a perpetual injunction against the proceedings at law, and as the Defendant has contested the contract he must pay the costs up to and including the hearing.

NOTE.—*Affirmed by the Lords Justices 22nd June, 1863.*

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WEALE v. OLLIVE. (No. 2.)

May, 4, 5.

THE testator by his will, dated in 1840, said :—

" I give the whole of my property, of every description, in trust to my executors to invest the same in English funds of Government all spare moneys that may come to their hands, that they may pay the interest of the same half-yearly to my nephew *Thomas Ollive*, of 30, *Great Pultney Street, Golden Square*, for his life, or they may empower him to receive the amount personally from the public offices appointed to pay the same; but he shall have no power to sell or mortgage this life interest to any other person, and in case of so doing, he shall forfeit his interest from the said funds, and they shall revert to the next claimant as I will appoint, that is to say, after his death or in case of his forfeiture, the interest shall be paid to the children of the said nephew *Thomas Ollive* and the children of my two nieces *Frances Weale* and *Frances White* that shall be legitimately born in wedlock, each sharing alike, and receiving their yearly interest after arriving at the age of twenty-one years. And should my executors think proper they may advance them a certain sum before their coming of age, should they have right of claim at that period; when advanced, that portion of interest will be reduced on arriving at the age of twenty-one years, in the same proportions as they had a previous advance. And after the said age of twenty-one years, they shall have the right to will away their share to whom they please on their death; and should they omit to make their will, then their interest shall go into the general fund for the benefit of the surviving children of

A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills.

Held, that they took absolute vested interests and not a life interest, with a power to bequeath, and that the gift over was void for repugnancy.

my

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~~W. Q. Williams v. Ollive (No. 2.)~~

my nephew and nieces aforesaid, and the last surviving children of my nephew and nieces aforesaid, and the last survivor shall be at liberty of disposing by will of the residue funds, supposing they may be increased by all former lapses of claims under various circumstances. Should the last of the aforesaid children omit the disposal of the residue on their death, then it shall become the right of my nearest of kin living."

The testator died in 1847.

Thomas Ollive died in 1863, but he had had no children, and the question now arose as to the rights of the children of the nieces under the will.

Mr. Selwyn, Mr. Cottrell, Mr. Hobhouse, Mr. White, Mr. W. Q. Williams, Mr. Cole, Mr. Law and Mr. Horsay, contended, first, that the unrestricted gift of income to the children of *Thomas Ollive*, *Frances Weale* and *Frances White* was a gift of the corpus of the fund; *Humphrey v. Humphrey* (a); *Elton v. Shephard* (b). Secondly, that this was an absolute gift, and not a life interest with a power of appointment; *In re Maxwell's Trust* (c); *Southouse v. Bate* (d); *In re Mortlock's Trust* (e). Thirdly, that the gift over, in case the legatees omitted to make a will, was inconsistent with and repugnant to the absolute gift, and that it was therefore simply inoperative; *Ross v. Ross* (f); *Williams v. Lomas* (g); *Henderson v. Cross* (h); *Holmes v. Godson* (i); *Hughes v. Ellis* (k); *Green v. Harvey* (l).

Mr.

- (a) 1 Sim. (N. S.) 536.
- (b) 1 Bro. C. C. 532.
- (c) 24 Beav 246.
- (d) 16 Beav. 132.
- (e) 3 Kay & J. 456.
- (f) 1 Jac. & W. 154.

- (g) 16 Beav. 1.
- (h) 29 Beav. 261.
- (i) 8 De G., M. & G. 118.
- (k) 20 Beav. 193.
- (l) 1 Hare, 428.

Mr. *Baggallay* and Mr. *Schomberg* contra, for the legal personal representatives of *Thomas Ollive*, and who was one of the next of kin of the testator, contended that there was an intestacy as to some of the shares beyond the estate for life. They argued that the cases cited were instances of absolute gifts in the first instance with superadded words, which were held repugnant. That here there was a mere life interest given with a power of disposition by will, with a gift over to the testator's next of kin in default of appointment; *Cooke v. Bowler* (a); *Blewitt v. Roberts* (b). That a gift over after an absolute interest, in default of the legatee not doing a particular act, was not necessarily void, but had the effect of restraining the extent of the prior gift; *Doe d. Stevenson v. Glover* (c).

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### *The Master of the Rolls.*

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In this case I am of opinion that the children of the nieces took an absolute interest. The will no doubt is very inartificially drawn; it was, as the testator states on the face of it, prepared by himself. It was suggested, that in consequence of the will having been drawn by the testator himself, it might admit of a different construction from what it would if it had been drawn by a professional man; but I apprehend that this is not so, and that the rules of construction must be exactly the same in both cases. The testator gives the interest of his residuary estate in trust for his nephew *Thomas Ollive* during his life, and he declares that he shall have no power to sell or mortgage his life interest to any other person; and in case of so doing, he shall forfeit his interest from the said funds

(a) 2 *Keen*, 54.  
(b) *Craig & Ph.* 274.

(c) 1 *C. B. Rep.* 448.

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funds and they shall revert to the next claimant. I apprehend that this declaration was wholly void and had no sort of effect. The testator might have given the income of the property to *Thomas Ollive* until he became bankrupt or insolvent, and then have given it over to another person; but it was not competent to him to give a life estate and then to say that he should not dispose of it. After the death of *Thomas Ollive*, or in case of his forfeiture, the testator says "the interest shall be paid to the children of the said nephew *Thomas Ollive* and the children of my two nieces *Frances Weale* and *Frances White*, each sharing alike and receiving their yearly interest after arriving at the age of twenty-one years." If the will had stopped there, a question might have been raised, whether, notwithstanding the words "sharing alike" that did not merely give them a life estate: but even then it is to be observed, that when he gives *Thomas Ollive* a life estate, he expressly uses the words "for his life" and speaks of his life interest: he uses no such words here, but says they are to share the interest equally. He then gives his executors a general power of advancing any one of the children until they attain twenty-one. That being so, I think that their interests vested in them immediately on the death of the testator, subject to the life interest of *Thomas Ollive*, and liable also to be reduced *pro tanto* by the birth of any subsequent child (although that question does not arise here) before the period of distribution. Up to this point every intention is shewn that they should take absolute interests in their shares. The testator proceeds, "and after the age of twenty-one years, they shall have the right to will away their shares to whom they please on their death." The interest is therefore given to them for an indefinite period and without any qualification, and when they attain twenty-one they are at liberty to will away their shares as they think fit.

It appears

appears to me that this gives to them an absolute interest in their shares.

Then follows a singular direction, "and should they omit to make their will, then their interest shall go into the general fund for the benefit of the surviving children of my nephew and nieces aforesaid." Here the word "interest" must, I think, mean the whole capital of their shares, and which is to go into the general fund. I am of opinion that this provision is repugnant to the character of the interest which he had before given them. Something might possibly have been said, if this direction had related to real estate, and there had been a direction that if the children omitted to do some act at a particular time the estate should go over to another; but I am satisfied that such a question does not arise here, which is merely whether this is a power which is incidental to the estate or repugnant to it. I fully concur in all those cases which hold that a right to will is an incident to and belongs to an absolute interest, and cannot be treated as a power. When an absolute interest is given, then the right to dispose of it by will is incidental to that estate and not a power attached to it. Here, if the testator had merely intended to create a power to bequeath this property, he ought to have given it to the children for life, with a power to dispose of it by will; instead of which, he gives it them in words, which, in my opinion, plainly import an absolute interest in the fund, and then adds, that if they do not dispose of it by will, it shall go to certain other persons. That was a condition which he had no power to impose on the absolute interest which he had previously given them.

The rest of the will appears to me to confirm this view, and I should be creating an intestacy if I were to hold

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hold otherwise, and this I am certain was not the intention of the testator. The case of *Cooke v. Bowler*(a), which was strongly pressed in argument, does not appear to me to assist the contention, that the children of the nephew and nieces took for life only, for in that case the words "for life" were used.

I think that the testator gave an absolute interest to these children, and that the condition imposed on them was void for repugnancy. I must make a declaration that they take absolutely in equal shares.

(a) 2 Keen, 54.

May 23, 25.  
 July 6.

A substituted bequest held subject to the same contingency as the original bequest.

A testator bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their "issue," if there should be any "children" to take their parents' share.

But in case the nephew or niece died "without issue, or leaving such they should die under twenty-one without issue," then he gave his or her share to the other of them or his or her issue "if he or she be then dead leaving issue as aforesaid." The niece died in 1811 leaving issue; the nephew died in 1862, leaving no issue. Held, that "issue" in the first part of the will meant "children," but in the latter part "issue generally," and that on the death of the nephew, all the issue of the niece then living took *per capita*.

*Re CORRIE'S WILL.*

THE testator bequeathed 15,000*l.* Consols to his wife for life, and his residuary personal estate (including the reversion of the 15,000*l.*) to his sister *Mary Streatwells* for life, and he proceeded as follows:—

"And after the death of my sister, I desire the principal moneys, &c. to be kept at interest by my executors and trustees with what I have before ordered to be paid to my sister, with the interest or dividends on the aforesaid 15*l.* stock after my wife's decease; and I desire the interest of all to be paid and applied and I give and bequeath equally between my nephew *John Corrie* and his sister my niece *Mary Portal*, the share of my niece

to

to be paid" to her separate use for the term of her natural life, "and after her decease and the decease of my said nephew respectively, I give and bequeath the principal moneys equally among *their issue*, if there be any child or children to take the share of their deceased parent. And in case both (a) my nephew and niece both (a) die without issue, or leaving issue they shall die under the age of twenty-one years without issue, then I give the share of him, her or they so dying to the other of them or his or her issue, if he or she then be dead leaving issue aforesaid. But if both my nephew and niece aforesaid shall die without issue aforesaid," then he gave a moiety to *Robert Campbell* and his heirs, and the other moiety to *Mary Lowree* and her issue.

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The testator died in 1807, his sister died in 1818 and his wife died in 1824.

*Mary Portal* died in *September, 1811*, leaving issue, and a moiety of the fund was thereupon divided amongst them.

*John Corrie* died in *August, 1862*, without having had any issue, and the second moiety then became divisible.

*Mary Portal* had seven children, of whom three of them died infants in 1811, a fourth, *William*, died without issue in 1826, and a fifth, *Caroline* (the wife of the Petitioner Mr. *Knight*), died in 1837. Two only, namely *Frances* and *Charlotte*, survived *John Corrie* and were still living.

There were numerous grandchildren and great grandchildren

(a) It was conceded that this word "both" meant "either."

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children of *Mary Portal* living, whom it is not necessary to specify.

The moiety of the fund which became divisible on the death of *John Corrie* having been paid into Court, Mr. *Knight*, as representative of his wife, presented this petition, praying a declaration of the rights of the parties, and for payment.

**There were forty-three Respondents to the petition.**

Mr. *Hobhouse* and Mr. *Bush*, for the Petitioner, the legal personal representative of *Caroline* (one of the daughters of *Mary Portal*), who died in 1837, in the life of *John Corrie*. First, in the gift to "issue" of *John Portal's* share, that word must be construed "children," in the same way as it was used in the former part of this will, where there is a reference to the parents' share; *Ross v. Ross* (*a*). The gift is by substitution, and children and grandchildren cannot take concurrently; *Robinson v. Sykes* (*b*).

Secondly, the gift vested in all the children of *Mary Portal*, and it was not a necessary qualification that a child should survive the tenant for life. The question, whether a substituted gift is subject to the same conditions and qualifications as the original gift, has been the subject of much difference of opinion, but the balance of authority and the most recent cases are in favor of there being no such implied condition; *Jarmar on Wills* (*c*); *In re Pell's Trust* (*d*).

Mr. *Selwyn*, Mr. *Speed* and Mr. *Faber*, for grandchildren

(*a*) 20 *Bear.* 645.  
(*b*) 23 *Beav.* 40.

(*c*) Vol. 2, p. 172 (3rd edit.).  
(*d*) 3 *De G., F. & J.* 291.

children now living. Issue is here used in its unlimited and extensive sense, and it may be construed differently in two parts of the same will; *Carter v. Bentall* (*a*). This gift over will therefore include grandchildren. But those only will take who survived *John Corrie*, the tenant for life; for it would be a strained construction to hold, that a legacy given over in case of *A.*'s death should belong to the estate of *B.*, who predeceased *A.*

**Mr. Leach** argued that "issue," in the first instance, meant "children," and that "issue aforesaid" in the latter part meant the same class, or the issue before designated. He cited *Malcolm v. Taylor* (*b*).

**Mr. Schomberg** argued that "issue" meant "children," and that the children of *Mary Portal* who survived the tenant for life alone took.

**Mr. Pemberton**, for Mr. and Mrs. *Murray* and their trustee, argued that the issue took subject to the same contingency as their parents. He cited *Macgregor v. Macgregor* (*c*); see also *Atkinson v. Bartrum* (*d*); and *Crause v. Cooper* (*e*).

**Mr. Druce** and **Mr. Townsend** for other parties.

**Mr. Hobhouse** in reply.

#### The MASTER of the ROLLS.

In this case a question of considerable interest and difficulty arises, having regard to the state of the authorities, for it must be admitted, that the passages read from

May 25.

- (*a*) 2 *Beav.* 551.
- (*b*) 2 *Russ. & M.* 425.
- (*c*) 2 *Coll.* 192.

- (*d*) 28 *Beav.* 219.
- (*e*) 1 *John. & H.* 207.

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from the last edition of *Jarman on Wills* (a) does not overstate the conflict of authorities. I have always considered the rule to be, that where, by a clause in a will, children are substituted for their parents, the same contingency which applies to the parents is also applicable to the children, and that it is necessary that the children should survive the period indicated to entitle them to take. Later authorities seem to contradict that view of the case, but it is scarcely possible to say, there are more authorities one way than the other. That is what I have always considered the rule, and it has considerable advantages, because, where a testator gives a legacy to one, but if he be dead at a particular period to another, it is improbable that he could have intended a dead person to be substituted for a dead person; on the contrary, the probability is, that he intended a person living at that period to be substituted for one then dead, though the rule is, that the vesting is to take place as speedily as possible, and also that the class shall be ascertained as early as possible.

Here the gift is to the nephew and niece, and after their deceases respectively to their issue "if there be any child or children to take the share of their deceased parent." And in case *both* my nephew and niece *both* die without issue, or leaving issue they shall die under the age of twenty-one years without issue, then I give the share of him, her or they so dying to the other of them, or his or their issue, if he or she then be dead, leaving issue aforesaid." It is admitted that the word "both" in the last passage is to be construed "either."

The state of the case is this:—The niece died in 1811, leaving seven children surviving her, and her share

(f) Vol. 2, p. 172 (3rd edit.)

share has been distributed. The nephew *John Corrie* died in *August, 1862*, without issue, and the question is, to whom his share goes, or which of the niece's issue are to take. Two of her children survived *John Corrie*, the tenant for life, and four died before him without leaving any issue. The first question is, how is the word "issue" to be construed, does it mean "children" or "issue generally." I am of opinion it means "issue generally." In the first part of the will, where the testator says "amongst the issue if there be any child or children to take the share of the deceased parent," I have no doubt, that "issue" means "children." In the next sentence he proceeds, "and in case both [either] my nephew and niece both die without issue, or leaving issue, they shall die under the age of twenty-one years without issue:" here, though "issue" in the first instance means children, yet I think that in the second instance it means "all issue generally." He proceeds "then I give the share of him, her or they so dying to the other of them of his or her issue, if he or she then be dead leaving issue aforesaid; but if both my nephew and niece aforesaid shall die without issue aforesaid," then he gives it over. I first consider this passage without the word "aforesaid." It is plain "issue" means without any issue at all, for the existence of any child or grandchild would prevent the gift over taking effect, and issue must here mean issue generally or there would be an intestacy. In the previous sentence, (reading it as the events have happened) the testator says, if my nephew "die without issue, or leaving issue they shall die under the age of twenty-one years without issue." Here again "issue" must obviously include not only children but grandchildren, because he speaks of issue dying without issue, which refers to grandchildren, and therefore means any issue. Then he gives the share of the nephew to the niece "or her issue,

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issue, if she be then dead, leaving issue aforesaid." She was dead and left issue, and they will take.

It was argued, from the addition of the word "aforesaid," that I must hold "issue" to mean children throughout; but I am not of that opinion. At the commencement the testator speaks of issue as children, and of their taking their parents' share, but he afterwards uses the word "issue" in a sense which goes clearly beyond children. Therefore "issue aforesaid" means issue last aforesaid, and it is *nomen generallissimum*.

That lets in forty-four persons; there is about 10,000*l.* stock to be divided; and the question is, whether these forty-four persons are to participate in it. My duty is to disregard the consequences. The question is, whether all the issue of *Mary Portal*, including those who died before *August, 1862*, take. I am of opinion that, in affirmation of that which I stated to be the rule, the words of this will mean, those only of the issue who survived *John Corrie*, the tenant for life, and not those who died in his lifetime. Observe the consequences; the nephew's share is given to the niece "or her issue" if she be then dead leaving issue. It is clear that, if any of the class who die in the life of *John Corrie*, the tenant for life, are to be included, the words "her issue" cannot receive any different interpretation whether such issue predeceased her or not. The niece left seven children, three of whom died a month after her; but if they had died a month before her, they must be included in the class, if all the issue coming into existence after the death of the testator, though dying before the tenant for life, are to be included in the class to take. On the death of *John Corrie*, this gift vested in possession in *Mary Portal* if she survived him,

him, but if not it then vested in her issue, therefore the gift to her issue was in abeyance, or the class contingent. How can they all, including those then dead, take? According to the rule, it must be because it was vested in them, but while she was alive it was contingent. They might, by possibility, take, because they had a sort of *nunc pro tunc* vested interest in this fund. It is clear that if all the niece's issue had died, even a day or two previously to the death of *John Corrie*, the gift over would have taken effect, because the niece had no issue at that time. Why, if there happened to be but one surviving child, am I not to construe the gift in the same way? Why am I to let in a number of deceased persons to participate in the bequest if there be but one survivor, but hold that it goes over if there be none surviving?

I think it means this:—If my nephew dies without issue, I give his share to my niece, but if she be then dead leaving issue, then to such issue, and therefore that the issue who survive the tenant for life alone take.

Declare that, upon the death of *John Corrie*, the funds vested in possession in all the issue of *Mary Portal* then living *per capita*.

Note.—Upon appeal, the Lords Justices, as I have been informed, differed. The decision was therefore affirmed, on the 18th of December, 1863, but the parties intend to appeal to the House of Lords.

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Estates of a husband were settled on the husband for life, with remainder to such uses as the husband and wife should appoint for raising money by mortgage, and in default to the wife for life, with remainder to the husband and wife in equal moieties. The husband and wife executed the power, for the purpose of raising money for the use of the husband: —*Held*, that the wife's estate could not be considered as surety for the husband's debt, and that she had no equity to have the whole mortgage money paid out of the husband's moiety alone.

SCHOLEFIELD v. LOCKWOOD. (No. I.)

SEVERAL questions arose in this case, which it will be convenient to keep separate.

Mr. *Dutton* was seised of certain real estates in *Yorkshire*. A post nuptial settlement, dated the 26th of *July*, 1832, was executed for valuable consideration, which was made between Mr. *Dutton* of the first part, Mrs. *Dutton* his wife and trustees of the other parts, whereby Mr. *Dutton* conveyed the estates to the use of himself for life, with remainder to such uses as Mr. and Mrs. *Dutton* should jointly appoint, for the purpose of raising money by way of mortgage or otherwise; and in default of the execution of such power and subject thereto, upon trust (after paying a certain specified sum) for Mrs. *Dutton* for life; and after her death, as to one moiety, to Mr. *Dutton* in fee, and as to the other moiety, to such uses as Mrs. *Dutton* should appoint; and in default, to her in fee simple.

On the 1st of *June*, 1837, Mr. and Mrs. *Dutton* executed their joint power of appointment reserved to them by the settlement of 1832, by way of mortgage to secure two sums of 600*l.* and 400*l.*, which were raised for the benefit of Mr. *Dutton* alone.

Mr. *Dutton* died in 1858 and Mrs. *Dutton* died in 1859, and a question arose, between the persons claiming under them, respectively, as to the mode in which the mortgages of 600*l.* and 400 ought to be borne.

Mr. *Hobhouse* and Mr. *Wickens*, on behalf of the persons

persons entitled to the wife's moiety of the estate, argued, that in the mortgage transaction of 1837 Mrs. *Dutton* was a mere surety for her husband, the money having been raised for his benefit and received by him alone. That consequently the whole mortgage was payable out of Mr. *Dutton's* moiety of the estate, so as to exonerate Mrs. *Dutton's* moiety altogether therefrom; *Lancaster v. Evors* (a).

Mr. *Selwyn* and Mr. *E. F. Smith*, for the Plaintiff, an incumbrancer by judgment on the husband's moiety, distinguished this case from that of an ordinary mortgage of a wife's estate for the benefit of her husband. They pointed out, that here the mortgage had been created by virtue of a power reserved by the husband out of his own estate for that purpose, and not out of any interest actually vested in the wife. They cited *Jarman on Wills* (b); *Jenkinson v. Harcourt* (c).

The MASTER of the ROLLS said that he thought that Mrs. *Dutton* could not, in the absence of any stipulation to that effect contained in the deed, say, that the whole of the charge was to be thrown on her husband's moiety, to the exoneration of her own.

March 18.

- (a) 10 Beau. 154.
(b) Vol. 2, p. 609 (3rd edit.) (c) 1 Kay, 688.

NOTE.—Affirmed by Lord Westbury, L. C., 6th November, 1863.

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Mar. 18.*

A property, which was subject to a mortgage of 1,400*l.*, was settled by a deed, which erroneously stated, that it was subject to a mortgage of 1,200*l.* The error being clearly proved, the Court, as between the parties claiming under the settlement, and under the peculiar circumstances, treated the estate as subject to 1,400*l.*, without a cross bill to rectify the settlement.

SCHOLEFIELD v. LOCKWOOD. (No. 2.)

MMR. *DUTTON* was seised of three properties in *Yorkshire*, subject, as to the second, to a mortgage for 1,400*l.* to *Powell*, and as to the third, to a mortgage of 3,000*l.* to another person.

By a post nuptial settlement executed for valuable consideration in 1832, and made between Mr. *Dutton* of the first part, his wife Mrs. *Dutton* of the second part and other parties, after reciting that Mr. *Dutton* was entitled to the property in question, subject to two mortgages on part thereof for securing the sums of 3,000*l.* and 1,200*l.*, and after reciting other matters, the properties were settled, subject to the above mortgages, on Mr. and Mrs. *Dutton* successively for their lives. But they had a joint power of appointment, with an ultimate remainder to them in fee in equal moieties.

It will be observed, that the deed stated erroneously one mortgage to be 1,200*l.* instead of 1,400*l.*

Subsequently, in 1835, Mr. *Dutton* mortgaged the first and second properties, expressly subject to the mortgage of 1,400*l.*; and in 1837, Mr. and Mrs. *Dutton* executed their power of appointment to secure a further mortgage, and they thereby empowered the mortgagee to sell and to pay the mortgage of 1,400*l.* and interest. This deed expressly referred to this mortgage as being one to *Powell*, and stated the amount of it to be 1,400*l.* and interest.

In addition to this, Mrs. *Dutton*, who died in 1859,
had,

had, in an answer put in by her in November, 1841, in a suit in chancery in which she was a Defendant, admitted that the 1,200*l.* was inserted in the deed of 1832 by mistake, and that the sum of 1,400*l.* was intended to have been inserted therein instead of it.

After the death of Mr. and Mrs. *Dutton*, the representatives of Mrs. *Dutton* insisted, that under the settlement of 1832, the property was charged with 1,200*l.* only, as between the husband and wife.

Mr. *Hobhouse* and Mr. *Wickens*, on behalf of persons claiming under Mrs. *Dutton*, argued, that as between Mr. and Mrs. *Dutton* and those representing them, the property was only subject to a mortgage for 1,200*l.* and not to 1,400*l.*, and that Mr. *Dutton* and those representing him were estopped, by the deed, from alleging that the mortgage exceeded 1,200*l.* That consequently the remaining 200*l.* was payable out of Mr. *Dutton's* moiety of the estate.

Mr. *Selwyn* and Mr. *E. F. Smith*, *contrā*.

The Master of the Rolls.

The question I have to determine depends on the effect to be given to the deed of 1832. There was no mortgage for the sum of 1,200*l.* affecting any part of the property, and I am called upon to decide whether this is a settlement of the property subject to the entire mortgage of 1,400*l.* or only to six-sevenths of it, viz., the 1,200*l.* mentioned in the deed. If there had been nothing more in the matter, the terms of the indenture, remaining unreformed, would be binding upon me; but I think that the subsequent transactions and dealings

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of the parties concerned and the declaration connected with them, establish, conclusively, that this sum of 1,200*l.* was introduced into this settlement by mistake for 1,400*l.*, and where this is established and has been acted upon, it is not, I think, necessary that the mere formality of a suit should be gone through to rectify an error, admitted by the persons interested in contending the opposite and who were parties to the transaction, in a deed, the trusts of which are fully performed or about to be so by my order, and where the persons originally interested in these trusts are all dead.

How this is made out will appear from the circumstances I am about to refer to. [His Honor referred to the mortgage of 1835 by *Dutton*, subject to the 1,400*l.*, and the appointment of 1837 by way of mortgage by Mr. and Mrs. *Dutton*, with trusts for sale and to pay that sum.] The deed of 1837 expressly refers to the mortgage to *Powell* and states it to be for a sum of 1,400*l.* and interest, and I consider this indenture, which was duly executed by Mrs. *Dutton*, as equivalent to an express declaration under seal, that the deed of 1832 contained the sum of 1,200*l.* by mistake for 1,400*l.* The mortgage is referred to as the mortgage of *Powell*, it is expressly treated as being a mortgage for 1,400*l.*, which was the real amount, there was no other mortgage, and the original settlement of 1832 does not treat the 1,200*l.* as the portion of the mortgage, but as the entire mortgage.

It is contended, on the other side, that *Thomas Dutton* and those who claim under him are estopped, by the expressed recital in the deed of 1832, from alleging the contrary; but I do not concur in this argument. If this were so, it would equally apply if a suit were instituted to rectify the settlement, and no deed could ever

ever be reformed, if the persons who committed the mistake were to be estopped from alleging it (however conclusive the evidence of such error might be) by the fact that the deed stated the contrary.

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In addition to this, Mrs. *Dutton*, in a suit in this Court, admitted that the 1,200*l.* was inserted in the deed of 1832 by mistake for 1,400*l.*

I consider this point, therefore, conclusively established, and I must treat the settlement of *July*, 1832, as if the sum of 1,400*l.* now appeared therein instead of the 1,200*l.*, as representing the mortgage due to *Powell*.

## SCHOLEFIELD v. LOCKWOOD. (No. 3.)

*Feb. 12, 13.*  
*Mar. 18.*

IN *February*, 1841, Mrs. *Lockwood* entered into possession of property mortgaged to her. At this time, the interest on her mortgage was in arrear and amounted to 96*l.*, and she and her representatives had remained in possession. The rents were more than sufficient to keep down the interest on the mortgages, and in 1858, the surplus amounted to 671*l.*

Under these circumstances, the representatives of the parties entitled to the equity of redemption insisted that the mortgagee in possession ought to account with annual rests.

Where the liability of a mortgagee in possession to account without annual rests once begins, it continues until changed by some further agreement come to between the mortgagor and mortgagees.

Mr. *Selwyn*, Mr. *E. Smith*, Mr. *Hobhouse* and Mr. *Wickens* for the parties entitled to the equity of redemption.

Mr.

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Mr. Baggallay and Mr. Forbes for the representatives  
of the mortgagee.

*Wilson v. Cluer* (a) was cited.

*The Master of the Rolls.*

I think it impossible to charge the mortgagee with annual rests; it being admitted that, at the time she took possession, the interest was in arrear, and that she did not receive within some weeks anything to pay off any capital. It is clear that when the liability of a mortgagee to account without annual rests once begins, it must continue until changed by some further agreement is come to between the mortgagor and mortgagees.

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*The Master of the Rolls.*

Mar. 18.

In February, 1841, Mrs. Lockwood entered into possession of the property included in the mortgage, the interest then in arrear amounting to 96*l.*, which, in my opinion, as I expressed at the time of the hearing, makes it impossible for the account against her estate to be taken with annual rests. There will be the common account against a mortgagee in possession and nothing more.

(a) 3 Beav. 136.

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## HARVEY v. HARVEY.

May 28.

THE testator was tenant from year to year of the farm mentioned in his will. The tenancy commenced on the 6th of *April* in the first year of the tenancy, and it was liable to be determined on the 6th of *April* in each year, subject to due notice being given.

By his will, dated in 1861, the testator bequeathed as follows :—

" I bequeath the right of occupation of and all my interest in my farm at *Brauncewell* and *Dunsby*, now held by me under the Marquis of *Bristol*, to my son *Thomas Harvey*. And I declare that such right of occupation of and interest in the said farm shall commence as and from the 6th day of *April next subsequent* to or following the time of my decease. I bequeath my household furniture and effects, and the whole of the consumable and other provisions, *farming stock and effects*, farming implements, growing crops and tenant right which shall be in and upon my dwelling-house and farm at *Brauncewell* and *Dunshy* aforesaid at the time of my death to *John Harvey, Richard Sutton Harvey and George Mortin* [his executors] upon trust to carry on my farming and grazing business, and, for that purpose, to continue tenants of the said farm at *Brauncewell* and *Dunsby*, and employ my live and dead agricultural stock and such part of my personal estate

A farmer bequeathed "the whole of the consumable and other provisions, farming stock and effects, farming implements, growing crops and tenant right" in or upon his dwelling-house and farm at his death to trustees, to carry on the farm "until the 6th of April next subsequent to or following the time of his decease," and after that day, to transfer "the consumable and other provisions, farming stock and effects," &c. then upon his house and farm to his son. He declared that his trustees were not to sell the "farming stock and effects" except as in the ordinary course of ma-

nagement of the farm, and that the money produced thereby should fall into his residue. The testator died about four o'clock on the 5th *April*, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn and wool of the last year's produce, and an excess of fat sheep and stock of the value of 3,314*l.* Held, that these passed to the son.

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as they shall think fit, until the 6th day of *April next* subsequent to or following the time of my decease; and upon further trust, immediately after the said 6th day of *April* next subsequent to or following the time of my decease, to transfer the household furniture and effects, consumable and other provisions, farming *stock and effects*, farming implements, growing crops and tenant right, which shall be then in and upon the said dwelling-house and farm at *Brauncewell* and *Dunsby* aforesaid, to my son *Thomas Harvey* for his own absolute benefit.

"I declare that the trustees or trustee, for the time being of my will, shall not sell and dispose of or otherwise convert into money the live and dead farming *stock and effects*, which shall be in and upon the said farm at *Brauncewell* and *Dunsby* now occupied by me, except nevertheless such part or parts thereof as it may be usual or desirable, from time to time, to sell or dispose of in the ordinary course of management of my farming and grazing business. And I declare that the money to be produced from such sale or sales shall go along with and be considered as forming a part of my residuary personal estate. I direct that a valuation of the household furniture and effects, consumable and other provisions, farming *stock and effects*, farming implements, growing crops and tenant right hereinbefore directed to be transferred to my son *Thomas Harvey* as aforesaid shall, on the same being so transferred to him, be made."

The testator then proceeded to state, that if the amount of the valuation should be less than 6,000*l.* then he bequeathed to his son *Thomas Harvey*, in addition, such a sum of money as, with the said valuation, would make 6,000*l.*

The testator died about four o'clock in the afternoon  
of

of the 5th of *April*, 1862. At the time of his death, there remained upon the farm, besides the growing crops and the ordinary farming stock, about 264 quarters of wheat and thirty quarters of barley, the produce of the preceding year and then unthrashed, about 471 tod's of wool; and, besides such sheep, horses and beasts as it was then usual to keep in the ordinary course of management of the farm, there were 338 fat sheep, two cart horses and a mare and twenty-six beasts, which were in excess of the live stock which the farm could, at the testator's death, profitably carry, and which were then, in the ordinary course of management thereof, properly for sale and not for use upon the farm. Sixty-two of the fat sheep had been clipped and ordered to market by the testator before his death, and the testator having died very suddenly, such lot was accordingly taken away by the salesman on the 7th *April*, 1863. The value of all these amounted together to 3,314*l.*

The Plaintiff *Thomas Harvey* took possession of the farm on the 6th of *April*, 1862, and the question was, whether this stock of unthrashed corn and the wool and fat sheep, &c. belonged to the Plaintiff *Thomas Harvey*, as part of the property directed to be transferred to him on the 6th day of *April*, 1862, or was to be considered as part of the general personal estate of the testator.

Mr. *Baggallay* and Mr. *Bristowe*, for the Plaintiff *Thomas Harvey*, cited *Vaisey v. Reynolds* (*a*); *Steward v. Cotton* (*b*); *Brooksbank v. Wentworth* (*c*).

Mr. *Hobhouse* and Mr. *Bathurst*, *contrā*, cited *Cole v. Fitzgerald* (*d*).

*The*

(*a*) 5 *Russ.* 12.

(*b*) 5 *Russ.* 17, n.

(*c*) 3 *Atk.* 63.

(*d*) 3 *Russ.* 301.

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The testator never anticipated that his death would occur on such an inopportune moment as to leave to his trustees about nine hours only for the performance of the trusts which they had to perform previous to the 6th of April.

The testator directs his farm to be carried on "until the 6th day of April next subsequent to or following the time of his death," he must, as in ordinary parlance, be taken to mean that particular day which first happened after his decease. He died about four o'clock on the 5th of April, and it was obviously impossible for the trustees to perform the trust in the intervening time.

The important question arises on the direction to transfer to the Plaintiff on the 6th of April "the household furniture and effects, consumable and other provisions, farming stock and effects, farming implements, growing crops and tenant right" in and upon his dwelling-house and farm. This is clumsily expressed, for his tenant right could not be "in and upon the dwelling-house and farm." It is to be observed, that the words "farming stock and effects" are used in two other places. He at first gives his "farming stock and effects," &c. to his trustees to carry on his business. He, in a subsequent part, declares, that they are not to sell "the farming stock and effects," except as may be usual or desirable in the ordinary course of management of his farm. Is it possible to say these words "farming stock and effects upon the farm" do not carry the corn, wool and sheep ready for sale to the trustees. The clear intention of the testator was, that they should pass to his executors, and if proper be sold by

by them. If the testator had died a month sooner, they would clearly have taken these articles under the previous bequest to them, and on the 6th of *April* they would have left on the farm only such portions of them as were proper and necessary to carry on the farming business.

The rule is distinct, that unless there is some very strong indication to the contrary, on the face of the will, the same words must mean the same thing in every part of the same will in which they are used. If, therefore, these words would carry the corn, the wool, the fat sheep and the beasts to the trustees, how can I say that, in the direction to the trustees to transfer the same things to *Thomas Harvey*, they mean something more limited and restricted. This is a construction which this Court cannot admit. If the words are to be restricted in the manner the Defendant insists, then the same restricted meaning must be given them in the next sentence, and none of these are to be sold by the trustees. It is possible that the wool would not be included in the words "live or dead farming stock," but I have no doubt it comes under the word "effects."

I have no doubt that the singular and unforeseen period of the death of the testator has defeated what he expected would be the result of his will; but I think the Plaintiff is entitled to the corn, wool, sheep and beasts.

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Practice as to permitting a bill to be amended after replication.

Specific performance of a contract partly by parol, though possession had been given and rent paid, refused, on the ground that it would be violating two rules regulating the exercise of the jurisdiction in specific performance; first, that a written agreement cannot be varied by parol; and secondly, that when a parol agreement is sought to be enforced, on the ground of part performance, it must be shewn, plainly and distinctly,

what the terms of the agreement are, and that the acts of part performance done are referable to that agreement alone.

Possession given and payment of rent under one agreement cannot be considered as a part performance of that agreement as substantially varied subsequently.

A written and signed agreement for a lease from the Defendant to the Plaintiff was entered into in June, and possession was given and rent paid. Afterwards, it was discovered that there were errors as to the nature of the tenures and rentals of the property, and in December, a fresh written and signed agreement was entered into. This was afterwards again varied by parol. A bill by the tenant for specific performance of the varied agreement was dismissed by the Master of the Rolls, and on appeal, the Lords Justices disagreeing, the decree was affirmed.

## PRICE v. SALUSBURY.

**T**HIS was a bill for specific performance, under the following circumstances:—

The Defendant, Sir *Charles J. Salusbury*, was, in 1859, possessed of considerable property, consisting of between twenty and thirty different holdings, besides many cottages and some chief rents, in the parishes of *Bishton, Llanmartin, Llandeaud* and *Llandewi*, all in the county of *Monmouth*. Much of this was held under the diocese of *Llandaff*, partly on leases for years, which would expire in 1866, and partly on leases for lives, and the rest of the land was freehold held by the Defendant in fee simple. There had been, before 1859 and in the early part of that year, much negotiation and talk between the Defendant and Plaintiff respecting these lands, and a proposal was made to the Plaintiff by the Defendant, more than once, to take them all at a fixed rent to be paid in advance. Ultimately, in *June, 1859*, an agreement was come to, which was as follows:—

“ Be it remembered, that Sir *Charles John Salusbury*, Baronet, hereby agrees to let, and *William Price*, Yeoman, to take, all and every the leasehold farms, farm-houses, lands, hereditaments and premises, held by him

him, the said Sir *Charles John Salusbury*, under the Lord Bishop of the diocese of *Llandaff*, situate in the respective parishes of *Bishton, Llanmartin, Llandeaud* and *Llandewi*, in the county of *Monmouth*, and the rights, easements and appurtenances therewith held, used or enjoyed, for and during all the rest, residue and remainders now to come and unexpired of and in the several term and terms of years in the same several and respective premises, from the 25th day of *December*, now next ensuing, at the yearly rent of 739*l.* 19*s.* 9*d.*, clear of all existing and future taxes, rates and outgoings (except property tax), and to be payable by yearly payments on the 28th day of *December* in every year.

*William Price* to pay to Sir *Charles John Salusbury* one whole year's rent, in advance, on the 25th day of *December* next, for which Sir *Charles John Salusbury* agrees to allow him interest thereon at the rate of 5*l.* per cent. per annum. And *William Price* is to be entitled to the full benefit and advantage of him Sir *Charles John Salusbury* of and in all and every the leases of the said premises so granted to Sir *Charles John Salusbury* by the Lord Bishop of the diocese of *Llandaff* as aforesaid. And Sir *Charles John Salusbury* hereby further agrees to execute proper assignments of such leases to him, *William Price*, when required so to do. Provided that if *William Price* shall fail to pay to Sir *Charles John Salusbury* the said whole year's rent in advance, as aforesaid, the assignment of the premises shall be forfeited. As witness the hands of the said parties this 23rd day of *June*, 1859."

The amount of 739*l.* 19*s.* 9*d.* was arrived at by referring to a list of the tenants' names, with the sums they paid set opposite to their names, amounting in the whole to 639*l.* 19*s.* 9*d.*, with an addition of 100*l.* per annum. Immediately after the agreement had been executed,

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executed, the Defendant signed printed notices on the tenants to quit on the 25th *December*, 1859, and then he gave them to the Plaintiff to deliver to the tenants, which he accordingly did. In this way, notices to quit were signed by the Defendant and delivered to all the tenants under him, except to the Plaintiff himself. On serving the notices, the Plaintiff discovered, from the inquiries he made from the tenants, that the list above referred to was imperfect. In one case, the sum set against the name was 16*l.* instead of 53*l.*, as it ought to have been, and in three other cases, the figures were not inserted at all, but blanks were left in the list opposite their names, which ought to have been filled with the sums of 5*l.*, 25*l.*, and 4*l.*; these added to the 37*l.*, the deficiency already mentioned, amounted altogether to 71*l.*, which, if added to the 639*l.* 19*s.* 9*d.*, would make the total rental received by the Defendant amount to the sum of 710*l.* 19*s.* 9*d.*

The Plaintiff said, that this error being discovered early in *December*, 1859, he went through the list with the Defendant, and made up the amount of the rent previously paid to be the sum of 710*l.* 19*s.* 9*d.* already mentioned, to which the 100*l.*, agreed upon as the addition to be paid by the Plaintiff, being added, made up the 810*l.* 19*s.* 9*d.*, which sum was paid by the Plaintiff to the Defendant, who gave him a receipt for that amount on the 9th of *December*, 1859, as follows:—

“ *December 9th, 1859.* ”

“ Received of Mr. Price his rent, in advance, for the year 1860, of the leasehold property in different parishes.

“ 810*l.* 19*s.* 9*d.* ”

“ *Charles Salusbury.* ”

By his inquiries from the tenants, the Plaintiff also discovered, between *June* and *December*, that a portion of

of their holdings were held by the Defendant for lives, under the see of *Llandaff*, and also that of a portion of the land in the parish of *Bishton*, held by some of them at a rental of about 17*l.*, the Defendant was seised in fee simple. He also discovered that the boundaries were confused and difficult to be distinguished. Having ascertained these facts, the Plaintiff, on the 26th *December*, called on the Defendant, and obtained from him his consent to sign a memorandum modifying the first agreement. Accordingly, the Plaintiff went away, caused such memorandum to be prepared, and brought it back to the Defendant who signed it. This second document was in these words :—

“26 December, 1859.

“This is to certify, that the lifehold property in the different parishes, and the freehold property in the parish of *Bishton*, belonging to me is to be held by *William Price*, at the same rent, per acre per year, in proportion of the present rental of the whole, after the term of years lease is expired until the longest liver that is in the life lease is expired.”

On the same day, the Defendant signed an authority for the Plaintiff to take possession, which he did, except as regarded two or three small holdings.

But these two papers and the revised list of the tenants and the amount opposite their names did not constitute the agreement sought to be enforced; for the second list, containing the tenants' names and the rents paid by them, was also inaccurate. The Plaintiff said, that, by mistake, it did not include two rents of 11*l.* and 10*l.* 16*s.* for two pieces of land, containing together a little more than twenty acres, held by the Plaintiff himself, at separate rents from his farm, of which the Defendant was seised in fee, and which were

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situated at *Bishton*. The Plaintiff alleged, that on the 26th of *December*, 1859, the Defendant agreed that the Plaintiff should have a lease of these two pieces of freehold, at the same rent *per acre* as the average rent per acre agreed to be paid for the lands for which the rent of 810*l.* 19*s.* 9*d.* had been agreed to be paid; but this was not specified in the memorandum of the 26th *December*, 1859. The Plaintiff, however, stated and gave evidence, to the effect, that they were intended to be so included by the words of the second memorandum.

The bill in the penultimate paragraph stated the result of the agreement in these terms:—

“ 34. The final agreement made between the Plaintiff and the Defendant, as hereinbefore appears, is to the effect, that the Defendant should assign to Plaintiff all the Defendant's estate and interest in the said lands and hereditaments now holden by the Defendant of the Bishop of *Llandaff* for lives and for years, and also to grant to the Plaintiff a lease of the said freehold lands in *Bishton*, belonging to the Defendant in fee, for the lives of the said *Edward Banks, Caroline Alston and Mary Phillips*, and the longest liver of them. The rent for the whole property taken by the Plaintiff to be 810*l.* 19*s.* 9*d.* per annum, and an added sum of 17*l.* or thereabouts for the said freehold lands in *Bishton*, which were to be taken at an acreage rent as aforesaid, free from all deductions, except in respect of property tax, during the residue of the said term of twenty-one years, and an apportioned part of such rent to be paid for the said lifehold and freehold lands after the expiration of the said term of twenty-one years, such apportioned rent being calculated at the same average rent per acre as the Plaintiff is to pay for the whole of the said land, during the whole of the residue of the term of twenty-one years, as aforesaid. The Defendant appears

to

to dispute the facts of some parts of the Defendant's freehold lands being included in the said lease, and if it shall appear that the Defendant has any freehold lands not so included therein, the Plaintiff, of course, does not claim them."

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This paragraph, as originally framed, did not state the agreement in the form in which it at present appeared, either in the original bill, or indeed in the bill as it stood after it had been once amended. It was not until after the bill had been a second time amended, that it assumed its present shape. This second amendment introduced the passage in italics, and it took place under peculiar circumstances. It had been permitted by the Court, after replication filed, while the evidence on which each side intended to rely was known to that side, but was unknown to the other side. It had been permitted, notwithstanding the earnest opposition of the Defendant, who contended that, in fact, the proposed amendments would introduce a new case.

Another difficulty, as pointed out by the Court, was, that if the memorandum of *December*, 1859, had the effect attributed to it by the Plaintiff in his evidence, it must include the whole of the Defendant's lifehold property in the different parishes, and the whole of his freehold property in the parish of *Bishton* belonging to the Defendant. But the Plaintiff shewed, that he held a piece of wood of the Defendant which was not intended to be included, and it also appeared that there were some smaller portions of freehold land in *Bishton* belonging to the Defendant which were not included in the agreement sought to be enforced by this bill.

The passage in the Plaintiff's bill relating to this
a a 2 matter,

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matter, and which was introduced upon the last amendment, was as follows :—

“The rents contained in the said list are correct, except that the rent paid by the Plaintiff, by mistake, did not include two rents of 11*l.* and 10*l.* 16*s.* for two pieces of land, one called *Jones' Meadow*, containing 7*a.* 2*r.* 17*p.* or thereabouts, and the other a piece of common land containing 12*a.* 3*r.* 12*p.* or thereabouts, which were held by the Plaintiff of the Defendant at separate rents from his farm. Both these pieces of land are in the parish of *Bishton*, and are held by the Defendant in fee simple. The Plaintiff also held a piece of wood from the Defendant at 2*l.* a year; the piece of wood is in the parish of *Llanwern*, but was not included in the agreement, the subject of this suit.”

The cause now came on for hearing.

Mr. Selwyn and **Mr. Jessel**, for the Plaintiff.

Mr. Baggallay and **Mr. Whitbread**, for the Defendant.

The Marquis of Townshend v. Stangroom(a); *Woollam v. Hearn*(b); *Clowes v. Higginson*(c); *Sutherland v. Briggs*(d); *Mundy v. Jolliffe*(e); *Ridgway v. Wharton*(f); 29 *Car. 2, c. 3*, were cited.

Mr. Selwyn in reply.

The

(a) 6 *Ves.* 328.

(b) 7 *Ves.* 24.

(c) 1 *Ves. & B.* 524.

(d) 1 *Hare*, 26.

(e) 5 *Myl. & Cr.* 167.

(f) 6 *H. of L. Cas.* 238.

The Master of the Rolls.

This is a bill filed for the specific performance of an agreement, whereby the Defendant agreed to let to the Plaintiff certain lands on certain terms and conditions; the agreement is a parol one, and the Plaintiff seeks the specific performance of it, on the ground of part performance. The first duty of the Plaintiff is, to establish what the terms of the agreement were. They do not appear in any one or more written documents; but it is alleged to be a parol agreement, evidenced partly by two documents in writing and partly by parol evidence, and which agreement has been part performed, by letting the Plaintiff into possession of the property demised, and by accepting rent from him, on the terms and according to the conditions of the agreement. This parol agreement, depending on two documents, the deficiencies in which are to be supplied by parol testimony, has been found so embarrassing to the pleader, that he has thought it desirable to set forth, in the nature of a summing up of his previous allegations in the bill, what the agreement is, which the Plaintiff seeks to enforce. He has done this in the penultimate paragraph of this bill.—[His Honor stated it (see *ante*, p. 450). He then stated the circumstances under which the amendment, after replication, had been permitted.]

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I find it so difficult, without hearing the cause, duly to appreciate the result and effect of such and similar applications, whether they be to amend or to add fresh evidence, that I frequently grant such applications, reserving to myself, at the hearing, the consideration of the circumstances under which the application was made, and how it may bear upon the opposite party at the hearing, and then to consider whether, if I had been, at the time when it was made, in possession of all the circumstances

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cumstances which the hearing of the cause discloses, I should have thought it right to grant such application, not, in any case, for the purpose of treating the Plaintiff's bill as if such amendment had not been made, but for the purpose of considering, when the whole case is before me, whether the amendment has been introduced, not in order to correct some accidental slip, but for the purpose of fitting and adjusting the Plaintiff's case to evidence subsequently obtained, and which, if the Plaintiff's case be correct, ought to have been within his knowledge when he filed his bill.

This appears to me a somewhat striking instance of the necessity of making this reservation, for the amendment, made in consequence of the order so obtained, adds a fresh term to the agreement, which had not been previously stated in the bill, but which was required, for the purpose of making the evidence and the peculiar situation of the property of which possession had been delivered to the Plaintiff consistent with the terms of the alleged agreement. This is more worthy of observation, because it must be admitted to be a circumstance extremely unusual, that a Plaintiff, who comes to enforce the specific performance of an agreement, should not be able accurately to state, in his instructions for the original bill first filed, exactly what that agreement is, in all its details, the specific performance of which he seeks to enforce.

It is obvious, looking at this bill and the various amendments added to it, that the pleader, who prepared it, must have felt extremely embarrassed as to the mode in which he should state the agreement, so as to make it consistent with all the various ramifications of evidence, depending partly on written documents and partly on oral testimony, and complicated with the peculiar nature of the

the property, consisting of leasehold, lifehold and fee simple all intermingled with each other. This uncertainty is unfavorable to the Plaintiff's case, which requires that there should be no doubt or uncertainty about the terms of the agreement which he seeks to enforce, which ought to be distinct in his mind and memory when he gives his instructions, and which he is not at liberty afterwards to modify and qualify, to suit the arising difficulties of the case. I felt this very strongly at the close of the opening and the reading of the written evidence in support of the Plaintiff's case.

At the same time, I am bound to state, on the other side, that the *viva voce* testimony of the Plaintiff, who has been cross-examined in Court by the Defendant, has gone a great way to remove the difficulties from his case, and to supply deficiencies in it, which were, as I thought, previously existing and all but insuperable. He has convinced me that a definite agreement was originally entered into between the Plaintiff and Defendant, and modified and added to by a further agreement come to between the same parties.

To explain my decision I must refer to the outlines of the facts established in this case. [His Honor stated the first agreement and the subsequent discovery of the inaccuracies.]

If the Plaintiff had come for the specific performance of the agreement of the 23rd of June, 1859, simply, or even with the variation produced by the altered list, as the consideration of which the receipt of the 9th of December, 1859, was given, it would have been very difficult for the Defendant to have resisted his demand; but much more took place before the terms of the agreement, as the Plaintiff seeks to enforce it, were settled.

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The imperfection of the statement of the amount of rent paid by the Defendant's tenants was not the only thing discovered in the interval between *June* and *December* by the Plaintiff. [His Honor stated the other errors in the second document of the 26th of *December*, 1859. See *ante*, p. 449.]

If these two papers, together with the revised list of the tenants and the amount opposite to their names, had constituted the agreement sought to be enforced, or had contained all the terms of the agreement, stating all and omitting none, although the difficulty in the way of the Plaintiff would then have been considerable (increasing as it does every step), still, even then, the Defendant might have found it difficult to resist a decree for specific performance. But these documents, so modified, neither constitute the whole agreement, nor do they contain all the terms and conditions of the agreement, the specific performance of which the Plaintiff seeks to enforce.

The second list, containing the tenants' names and the rents paid by them, was also inaccurate. The Plaintiff says, that, by mistake, it did not include two rents of 11*l.* and 10*l.* 16*s.* for two pieces of land containing together a little more than twenty acres, held by the Plaintiff himself at separate rents from his farm, of which the Defendant was seised in fee, and which were situated at *Bishton*. The Plaintiff however stated, and gave evidence to the effect, that they were intended to be included by the words of the second memorandum. The Plaintiff alleges, that on the 26th of *December*, 1859, the Defendant agreed that the Plaintiff should have a lease of these two pieces of freehold at the same rent per acre, as the average rent per acre agreed to be paid for the lands for which the rent of 810*l.* 19*s.* 9*d.* had been agreed

agreed to be paid; but this was not specified in the memorandum of the 26th *December*, 1859.

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However it is to be observed, that this allegation, now made by the Plaintiff, was not made as his original bill, and even after it had been corrected by his first amendments, the allegation respecting it was, as now averred, incomplete, and it was only made perfect by the second amendment, made under the circumstances already mentioned. This is not, as in some cases it might be reasonably considered to be, a mere technicality arising from a slip of the pleader; it is obviously substance, and the whole case and evidence satisfy me, that the averment of agreement has been necessarily and unavoidably altered, to meet the exigencies of the case as they arose from time to time.

But the difficulty does not cease here. Even if the memorandum of *December*, 1859, in its loose and general way, could be construed to have the effect attributed to it by the Plaintiff in his evidence, then the meaning of this memorandum must be, to include the whole of the lifehold property in the different parishes, and also all the freehold property in the parish of *Bishton* belonging to the Defendant. But this is not the agreement, the specific performance of which is sought by this suit; for the Plaintiff says, that besides the two pieces of land above mentioned (which he asserts to have been included in the agreement), he also held a piece of wood from the Defendant at a rent of 2*l.* a year in the parish of *Llanwern*, which is not included in the agreement, and which, as the Plaintiff insists, was not intended to be included in it. And besides all this, it further appears from the evidence, that there are also some small portions of freehold land in *Bishton* belonging to the Defendant which are not included in the agreement, as that agreement is
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alleged and as it is sought to be enforced by the Plaintiff.

It is obvious, from this statement, that the whole thing is too vague and uncertain, for the Court to be able to satisfy itself that it can ascertain what the real terms of agreement were, which, if ever, were finally settled between the Plaintiff and the Defendant; whether it be that which the Plaintiff originally alleged, or that which the parol evidence of the Plaintiff alone now supports. The pleader, no doubt, has, as I have said, ultimately, after a second amendment, with great difficulty, stated a parol agreement, which, though not that originally stated by the Plaintiff, and which, though not that proved by the written documents which are given in evidence, is attempted to be supported by the evidence of the Plaintiff. Singularly enough this evidence is given by the Defendant; it is not confirmed by anything else, and it is now relied on, on behalf of the Plaintiff, in order to make the agreement alleged consistent with the delivery of possession to the Plaintiff of the various pieces of land held by the tenants whose names were written in the list referred to, and which possession was effected by the notices to quit given to the Plaintiff and delivered by him, and also, at the same time, to make it consistent with the amount of rent paid by the Plaintiff and received by the Defendant.

It is complicated and intricate, and leaving out of consideration altogether the denial of the Defendant, I have endeavoured, by means of the parol evidence of the Plaintiff and by taking the other statements as they appear in the list of tenants and the evidence, to trace out and complete the agreement as the Plaintiff now alleges it; but even then I have been unable to do so, unless by paring off from one list and adding on to another list, and all this without any security for its accuracy,

accuracy, beyond the mere unsupported oath of the Plaintiff, and all this in the teeth of a denial by the Defendant of any concluded agreement at all. In fact, I am convinced that the task is an impracticable one, and that if the Court were to support the Plaintiff's case, as he now states it, it would be violating several of the most important rules which regulate Courts of Equity in the exercise of its jurisdiction in specific performance, one of which is, that if this is to be considered as a written agreement, it cannot be varied by parol; and that if this be a parol agreement sought to be enforced in this Court on the ground of part performance, it must be shewn, plainly and distinctly, what the terms of the agreement are which has been part performed, and that the acts of part performance are referable to that agreement alone; which, in my opinion, has not been done.

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My impression on this subject was so strong, at the hearing of the case, that I was at first in doubt, whether I ought to have called on the Defendant to be heard in answer to it; but, as the Defendant proposed to examine the Plaintiff, I thought it desirable to hear the account he gave of the matter, and his evidence given in Court went so far to support his case, that it made it necessary for me to go into the matter more fully and minutely. It appears that he is unable to write, beyond signing his name and setting down figures, and that he reads imperfectly—only sufficiently well to distinguish whose handwriting it is if it be familiar to him, and also to read figures. He is, however, a very acute man, and gave his evidence in a way which went, so far as it was possible, to support the case he had made by his bill; but the most careful attention to that evidence satisfies me, that the agreement of the 23rd June, 1859, was entered into without any knowledge of the real circumstances connected

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connected with the property proposed to be demised. That it was then found impracticable to act on this agreement, and that afterwards, although some patching of the original agreement was resorted to, no definite and concluded agreement was come to, suited to the peculiar nature of the tenures of the land demised and to the possession given in respect of the notices signed and served in *June, 1859.*

Even if such an agreement could be spelt out of the proceedings and evidence of the parties, I am still of opinion that there was no part performance of it. The acts constituting the part performance must have reference to the agreement sought to be enforced ; but the possession given, in this case, was in respect of the agreement of *June, 1859*, and under notices then signed and served, not in respect of a subsequent and newly altered agreement. The evidence of the Plaintiff shews, that the agreement on which he now relies could not have been entered into before the 26th of *December, 1859*. The first payment of rent is before the agreement of *June, 1859*, was finally moulded into the form the Plaintiff now contends for, which was not till the 26th of *December*, and after that, the rent paid is ambiguous, and may be referable as much to one as the other.

The evidence of the Plaintiff seems to me to amount to this :—The agreement, as he now alleges it, is what would, if the Plaintiff and Defendant had each, in *June, 1859*, fully understood every circumstance connected with the holding and position of the property intended to be demised, have been agreed upon between them, and the additions and alterations made by the Plaintiff are in the spirit of the agreement and for the purpose of giving due effect to it and to the possession which was delivered to the Plaintiff and the payment made by him in

in pursuance of it. The Plaintiff was certainly, and I believe the Defendant also was, in *June, 1859*, ignorant of what the tenures were of all the property, and how they were intermingled. At this time, notices were signed and served, in order that possession might be given of the whole property, leasehold, lifehold and freehold, except that held by the Plaintiff. This is inconsistent with the agreement then in force. After this, in order to make the agreement fit with the possession delivered, first one term is added, then another change is made or attempted by the Plaintiff to be made, then a piece is omitted or attempted to be omitted by the Plaintiff, as the light respecting the property gradually dawned upon his mind, and was by him communicated to the Defendant. The evidence, however, of the Plaintiff shews, that the Defendant, throughout the whole matter, knew what he was about; and I cannot, on account of the peculiar and qualified self-stultifying plea of the Defendant (*a*), concede anything to him or his case which would not belong to a person actively and intelligently managing his own property.

I think that the Plaintiff's bill must be dismissed; but having regard to the circumstances of the case, and more especially to the evidence given by the Plaintiff *viva voce*, to the effect, that the first and repeated solicitations to the Plaintiff to take a lease of the property proceeded from the Defendant, in the first instance, although the whole matter was never finally completed, I do not think fit to give any costs.

(*a*) *This referred to a statement of the Defendant as to his deficient memory.*

NOTE.—On appeal, the Lords Justices disagreed, and this decree was affirmed; but an appeal to the House of Lords is pending.

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*May 29.*

Where the solicitor of a company writes a letter apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity.

HOWARD *v.* GUNN.

**I**N January, 1863, the Plaintiff, the Defendant and others were concerned in getting up a company, called "*The City of London and General Fire and Life Insurance Company, Limited.*" The Plaintiff *Howard* acted as the solicitor, and the Defendant *Gunn* as the manager.

It was arranged by the Defendant, as the acting manager, that Mr. *Jamieson* of *Aberdeen* should have 1,000 shares allotted to him and his friends. But the Plaintiff, on the 12th of February, 1863, sent a letter to Mr. *Jamieson*, by which he appeared to negotiate a new arrangement, and it was in the following terms:—

“London, 12th Feb., 1863.

“My dear Sir,—Being at the offices of the company to-day, I saw your letters to Mr. *Gunn*; and in reference to your inquiry as to how the company is going on, I am happy to inform you that a large number of applications has been made, and that the directors have determined to allot only to those persons, whom they can rely upon will hold the shares for the purposes of investment, and as I have no doubt your friends are persons of that class, I take for granted you will not object to guarantee for them, or procure for them a guarantee, not to part with any share that may be allotted to them for a period of three months from the day of allotment, and for that purpose, I enclose you a form of letter, which you will be good enough to sign (to be altered by you if you guarantee for the whole, or to be left intact if signed by the parties), and I shall be obliged to you if you

you will forward the same to me by the return of post, as the allotment is intended to be made on *Monday* next. Referring to the recent interview between yourself and Mr. *Gunn*, and the proposal which you made, at the time, to place two thousand shares or upwards, I need scarcely remind you, that you have not performed your part of the bargain, and that therefore the directors are relieved from making any allotment whatever to you or your friends. You may, however, rest assured, that the directors are perfectly ready to fulfil their part of the undertaking to the utmost, provided you give them the assurance above asked for, and which you will, of course, remember you have expressed at all times your readiness to do."

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On the following day, Mr. *Jamieson* sent a copy of this letter to the Defendant, with a letter, saying that he did not know in what capacity the Plaintiff had written to him, but that "it did not appear to be official." He remonstrated against the attempt to change the first arrangement with him, and insisted on the directors fulfilling their engagement.

Disputes and differences ensued; *Jamieson* took hostile proceedings, and the directors returned the deposits and wound up the company. Subsequently, on the 27th of March, 1863, *Howard* gave to *Gunn* a written guarantee, for payment of 600*l.* for a year's salary, and to indemnify him against all costs, &c., in consideration of *Gunn's* waiving all further claims against the company.

*Gunn* had recently written and published a pamphlet, entitled "Statement relative to the Difficulties of 'The City of London and General Fire and Life Insurance Company,'

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*Company, Limited,' addressed to the Shareholders by A. H. Gunn, late Manager of the Company."* This contained a copy of the Plaintiff's letter of the 12th of *February*, 1863, and of the guarantee of the 27th of *March*, 1863.

The Plaintiff filed this bill in *May*, 1863, to restrain the publication of these two documents. In his affidavit, he said, that the letter in question had been written by him in his private capacity and not as solicitor of the company, and that he had never parted with his property therein. That the pamphlet contained many false and garbled statements respecting him and his conduct.

On the 7th of *May*, the Plaintiff obtained an *ex parte* injunction, restraining the publishing and selling of the letter and guarantee, and a motion was now made to dissolve the injunction.

The Defendant did not contradict the Plaintiff's statement, that the letter had been written in his private capacity ; but he said it was unknown to him whether the Plaintiff had "any authority or instructions" to write it. The Defendant also said, that his conduct and character having been impugned, he considered that he ought and that he was legally entitled to publish the pamphlet and documents to exculpate himself.

Mr. Selwyn and Mr. Locock Webb, for the Defendant, argued, that these letters were written by the Plaintiff merely as the agent and on behalf of the company, and that the Plaintiff had no property in them. But that even if he had, still the Defendant had a right to publish them as a statement to the shareholders to vindicate his conduct

conduct and the proceedings of the company; *Percival v. Phipps* (a).

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Mr. Baggallay and Mr. Ince for the Plaintiff. The writer of letters has a property therein similar to a copyright, and no one is entitled to publish them against his wishes or without his consent; *Pope v. Curl* (b); *Gee v. Pritchard* (c). Here, the letters were written by the Plaintiff as a private individual, and not in his capacity of solicitor to the company.

### *The Master of the Rolls.*

I am of opinion that this injunction cannot be sustained. I accede to the views of the Plaintiff, that a person has a property in letters written by him, and that this right cannot be violated by the person who receives them; but this, however, is subject to many exceptions and qualifications.

If the agent or servant of a company write a letter to a shareholder, it is the property of the company, and the agent or servant cannot say to the company, "you shall not produce or publish that letter." Many instances may be adduced to shew that a letter is not always necessarily the property of the person who wrote it. If the solicitor of an insurance company established in London, by the direction of the directors, wrote a letter to one of the shareholders in the country, it is clear that such letter is not the property of the solicitor, and that he cannot say that the company have not a right to publish it.

Take

(a) 2 Ves. & B. 19.  
(b) 2 Atk. 342.

(c) 2 Swan. 402.

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Take it a step further and assume that the solicitor wrote a letter, but not by the direction or on behalf of the directors, though it had all the appearance of being written on their behalf of and by their direction. Thus, if it were written to a person who proposed to take shares in the company, and it related to the affairs of the company, and contained authoritative information on behalf of the company, in answer to an application for shares, and the person who receives it treats it as such, and sends back to the company objecting to its contents, shall the solicitor be allowed to complain of its publication and to insist that it is a private letter, though it appears to be written on behalf of the directors. The answer is, if that be so, it ought not to have been written.

This letter, which was written to *Jamieson*, who had applied for shares, was apparently, on the face of it, written on behalf of the directors, and its contents clearly shews it. It is not marked "private" or "confidential;" it was written to guide the directors in the allotment of shares, and it asks that Mr. *Jamieson* should give the directors a written guarantee not to part with the shares for three months. If the Plaintiff did not intend to write this letter on behalf of the directors, he ought to have said distinctly, "this communication is not made on behalf of the directors," or "I am a shareholder and make this communication to you in my private capacity." But, on the contrary, the Plaintiff, in terms, writes on behalf of the directors to guide them in their allotment, and asks for an answer by return of post.

If that letter was not written on behalf of the directors, it was written to deceive *Jamieson*. It has all the appearance of having been written by the Plaintiff on their behalf, and *Jamieson* so treats it, for he writes to the manager in answer to it. Can the Plaintiff be allowed

allowed to say that the company have no right to publish it? and if they have, is not the Defendant entitled, as regards the Plaintiff, to bring it forward? It is obvious that this was not a private letter and was not intended to be a private letter.

The second document is really an agreement, but they both relate to the management of the company, and the solicitor of the company cannot claim any exclusive property in them, and say that the company and their manager are not entitled to publish them. I must dissolve the injunction with costs.

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#### WENTWORTH v. LLOYD.

March 11, 12,  
16, 17, 18, 20.  
April 17.

THIS bill was filed to set aside a sale by an agent to himself and others, on the allegation that the fact had been concealed from the vendor.

The Plaintiff Mr. *Wentworth* and the Defendant Mr. *Lloyd* were jointly and beneficially interested in the sheep and cattle on the runs of property in the *Liverpool Plains* on the *Namoy River* in *Australia*, called the *Namoy Stations*, and in the profits to arise therefrom, in equal proportions.

Towards the end of 1852 the Plaintiff was desirous of selling the property, and previous to *March*, 1853, he consulted Mr. *Mort*, an auctioneer and land agent at *Sydney*, on the subject of the sale. On the 11th of *March*, 1853, the Plaintiff and Defendant *Lloyd* went to *Mort* and gave him a description of the station and

A bill to set aside a purchase of property by an agent dismissed with costs, it being proved that the Plaintiff had distinct notice, at the time, that the agent was one of the beneficial purchasers, and the vendor not having instituted a suit for six years.

Evidence of the notoriety of a fact in a neighbourhood rejected.

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stock, and authorized him to sell it as an entirety. But afterwards, and before any contract had been entered into, it was settled that *Lloyd's* share was not to be sold, and that the Plaintiff's share alone should be disposed of. After this had been settled, an arrangement was made (unknown to the Plaintiff) between *Croft*, *Tooth* and *Mort*, under which they were to take the Plaintiff's half, estimating the whole at 29,860*l.*, the half of which sum was to be paid or secured to the Plaintiff. The purchasers were to become partners with *Lloyd* in the concern and he was to have the management of it. The exact date of the whole transaction did not clearly appear, but the Court thought, on the evidence, that the parol agreement to sell to *Croft* and *Edward Tooth* took place on the 15th or 18th of *March*.

Considerable discussion took place between *Croft*, *Tooth*, *Mort* and *Lloyd*, at which the Plaintiff was not present and of which he knew nothing, as to the shares and interests which these four gentlemen were to take in the partnership, and how it should be managed. This was finally settled at a dinner at which these four gentlemen were present, on the 24th of *March*, 1853. By the terms of this partnership, so arranged, *Lloyd* was to have the general control of the concern, *Mort* was to be the agent in *Sydney*, and one-tenth of the profits was to be the salary of *Lloyd's* brother for the active management of the stations. The right of closing the concern was to be left to the majority; but in the case of a sale, or of dissolution, at any time, *Lloyd* was to be at liberty to take the whole or the share of any one of his partners at a valuation, and the firm was to be called *Lloyd & Co.*

Mr. *Mort* represented to the Plaintiff that he had sold the entirety for 29,860*l.*, and he signed a contract for the sale on the 30th *March*, 1853, of which he presented the

the Plaintiff, Mr. Wentworth, with a copy. It was as follows :—

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*"I have this day sold for Messrs. Wentworth & Lloyd, to Messrs. Lloyd, Croft & R. and E. Tooth, the stations belonging to the former gentlemen in the Liverpool Plains and Gwydir Districts, together with the sheep and cattle, horses, stores, &c. thereupon. Price for the sheep, 9s. (nine shillings), taking them at 42,000 ; for the cattle, 30s. (thirty shillings), taking them at 5,800 ; store horses, drays, bullocks, &c., to be taken at 2,000*l*. (two thousand pounds) ; and 260 rams, 20s. (twenty shillings) each, making the amount as follows, viz. :—*

*" 42,000 sheep, at 9s. . . . 18,900*l*.*

*" 5,800 head of cattle, at 30s. . 8,700*l*.*

*" 260 rams, at 20s. . . . . 260*l*.*

*" Stores, &c. . . . . 2,000*l*.*

*“ 29,860*l*.*

*“ Payment— $\frac{1}{4}$  (one-fourth) cash, residue by bills at six, nine and twelve months. Bank interest added on transfer of stations and order for delivery being given. Delivery to be made and received on the 1st day of May next.*

*“ For vendors and purchasers,*

*“ Thos. S. Mort.*

*“ Sydney, 30th March, 1853.”*

This contract was wholly silent as to *Mort's* having any interest in the concern, and the Plaintiff mainly relied on this very strong circumstance in his favour. The contract was sent to the Plaintiff apparently on the 30th of *March*, the day it bore date, and it was returned by him on the 2nd of *April* to *Mort*. Three months afterwards, on the 1st of *July* following, *Lloyd* gave 2,500*l*. to each of his three partners for their bargain, shewing

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shewing that, at that time at least, the Plaintiff might have got an increase of 50*l.* per cent. for his moiety, and might have obtained 22,430*l.* for it instead of 14,930*l.*, the amount paid to him.

This bill was filed on the 24th of *March*, 1859, by *Wentworth* against *Lloyd, Mort, Tooth* and others, insisting that the sale was void, and stating that he had not discovered the fact that *Mort* had been a co-purchaser until the month of *February*, 1859. It prayed a declaration that the Plaintiff was entitled to one moiety of the stations, sheep, stock, &c., for a re-conveyance, and for an account of the profits, the Plaintiff being willing to account for the 14,930*l.* received by him.

The Solicitor-General (Sir *R. Palmer*), Mr. *Southgate*, Mr. *Surrage* and Mr. *Marsden* for the Plaintiff.

Sir *H. Cairns*, Mr. *Baggallay* and Mr. *Pemberton* for Mr. *Lloyd*.

Mr. *Rolt* and Mr. *Dickenson* for Mr. *Mort*.

Mr. *Selwyn* and Mr. *Erskine* for Mr. *Croft*.

Mr. *Jessel* for Mr. *Tooth*.

Mr. *Roundell* for the other Defendants.

*Randall v. Errington* (*a*) ; *Murphy v. O'Shea* (*b*) ; and see *Charter v. Trevelyan* (*c*) ; *Gillet v. Peppercorn* (*d*) ; *The Bank of London v. Tyrrell* (*e*).

*The*

(*a*) 10 *Ves.* 423.

(*b*) 2 *Jones & Lat.* 422.

(*c*) 11 *Ct. & Fin.* 714.

(*d*) 3 *Beav.* 78.

(*e*) 27 *Beav.* 273, and 10 *H.*  
of *L. Cas.* 26.

*The Master of the Rolls.*

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This suit is instituted to set aside the sale of certain runs of land in *Australia*, on the ground that the Defendant, Mr. *Mort*, who was the agent employed by the Plaintiff to effect the sale, took a beneficial interest in the purchase, and that this circumstance was well known to all the persons who joined in the purchase. That, in fact, as to parts, Mr. *Mort* sold to himself, and that he did this with the knowledge and concurrence of his co-purchasers, but without the knowledge or sanction of the Plaintiff. The law applicable to the subject is not disputed, at least as to its general effect. If the fact, as I have stated it, be established, the sale cannot be permitted to stand good, and though there may be considerable complication and some difficulty in working out the consequent equities, the decree must proceed on the basis of the sale itself being wholly annulled. *Prima facie*, all that a Plaintiff has to do, in such a case, is, to prove the fact of the agency of the Defendant and the fact that he was beneficially interested in the sale made. This the Plaintiff has done beyond all doubt or question; he has also as clearly proved that all the co-purchasers were aware both of the agency of *Mort* and his interest in the purchase. The burthen then falls on the Defendants to prove how they can justify or maintain such a sale.

Although there are considerable distinctions between the case of each Defendant severally, yet generally they all unite in this one defence, which is put prominently forward by the Defendant *Lloyd* and the Defendant *Mort*, viz., that the Plaintiff was, from the beginning of the transaction, and was throughout the transaction, and has continued down to the present time, cognizant of the interest his agent took in the purchase, and that

he

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he has never complained of this till after the lapse of several years, when the property in question has become very much more valuable than could have been anticipated at the time of the transaction itself. This, if established, would unquestionably constitute an effectual bar to the Plaintiff's obtaining any relief in respect of such sale or ever questioning its validity.

The transaction complained of took place in *March*, 1855, the bill was not filed till the 24th *March*, 1859, the Plaintiff avers, that it was not till *February*, 1859, that he became acquainted with the vice which taints the transaction, viz., the sale by the agent to himself. The real question which, in my opinion, I have to determine is one of fact :— Did the Plaintiff or did he not know of the interest taken in the purchase, by the gentleman whom he had employed as his agent to sell, at the time of the transaction itself or within a very short space of time afterwards ? The task of proving this falls on the Defendants. The Plaintiff declares that he was wholly ignorant that *Mort* had any interest in the sale, and that he never would have consented to the sale had he been made acquainted with the fact. The Defendants, *Lloyd* and *Mort*, declare that he was fully cognizant of that fact, and that they severally informed him of it. This is the main point on which this case depends, and I now proceed to consider and to examine the evidence on both sides relating to it.

Before doing so, it is proper to make a few observations on the question, whether this property was sold at an undervalue. It is true that, if it was not, this cannot add to the validity of a sale made by an agent to himself. If sold for a full value it would not make such a sale good, but still if sold for an undervalue, it would import the additional ingredient of fraud into the transaction.

transaction, and explain the motives for such a sale by the agent to himself. In this case, I think the ingredient of fraud does not enter, and I am of opinion, on the evidence, that the property sold for its full market value at that time, that is, in *March*, 1853. The discovery of gold in *Australia* raised the price of stations generally in so rapid a manner as to make the increased price given by *Lloyd* three months after no badge of fraud or any evidence of an undervalue in the price given in *March* previously.

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I do not think that the evidence offered, as to the notoriety in *Sydney* of the fact that *Mort* was a purchaser, is properly admissible to influence the decision of the cause, and I have wholly disregarded it.

The burthen of proof, to establish that Mr. *Wentworth* knew of the fact of *Mort's* interest, lies with the Defendants, and the question is, have they satisfied that obligation? It is certain, however, that if they concealed it from Mr. *Wentworth*, they did not do so from any one else. The mortgage deed securing to *Mort* the purchase money paid by *Lloyd* to *Mort*, *Croft* and *Tooth* was duly registered in July, 1853. This deed distinctly states the interest of *Mort* as a purchaser. Previously to that time, *Lloyd* went to Mr. *Gilbert Wright* (who was the Plaintiff's solicitor) with instructions to prepare the articles of partnership between him and the purchasers, *Mort*, *Croft* and *Tooth*, explaining the whole matter and shewing *Mort's* interest as a purchaser. [His Honor examined the evidence and, in the course of it, made some observations in relation to the circumstance, that in taking the evidence in *New South Wales* the Plaintiff had prevented his solicitor stating what the Plaintiff had said to him on the subject of the sale, by objecting that the communication was privileged. But as these observations

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observations were made under the impression (which turned out to be erroneous), that the solicitor had been called as a witness by his client, and that the objection had been raised in his cross-examination, they are here omitted.]

The burthen of proof lies on the Defendants to prove distinct information to the Plaintiff and acquiescence by him after such information given. It must, however, be observed, though the burthen to do this lies on the Defendants, yet that, when a matter is contested six years after the event has occurred, where much material evidence may have been lost, the Defendants are entitled to every fair and reasonable presumption that may be drawn in favor of the direct testimony they adduce. In my opinion the Defendants have discharged the obligation so laid on them, and they have proved, though he may afterwards have forgotten it, that distinct information was given to the Plaintiff, at the time, of the fact that *Mort* was one of the beneficial purchasers of the moiety sold by the Plaintiff, and also that the Plaintiff has acquiesced in that fact, by not taking any steps to contest the sale for six years after it was accomplished. This being my opinion, it becomes unnecessary for me to consider any question of detail between the other Defendants. The Plaintiff's case fails, in my opinion, as regards *Lloyd* and *Mort*. It fails, therefore, altogether as against all the Defendants, and the bill must be dismissed with costs.

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NOTE.—*Affirmed by the House of Lords, 27th of May, 1864.*

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*Re SEWELL.**May 8.*

**M**R. JOHN PEARSON applied, on behalf of a solicitor who had ceased to take out his certificate in 1853, with the intention of being called to the Bar, for an order enabling him to renew his certificate without undergoing a preliminary examination. He stated that the Court of Queen's Bench had decided he must be examined, and observed that he was still on the Rolls of this Court as a solicitor.

A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the Bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination.

*The Master of the Rolls.*

I have considered this case and the statement of the *Incorporated Law Society*. As I understand the case, this gentleman practised till 1853; at that time he ceased to take out his certificate, intending to be called to the Bar. He has ever since been actively engaged in legal pursuits, he has never abandoned the profession, and there is not the slightest personal imputation against him. I think I am not entitled, under these circumstances, to refuse his certificate, and to say that he is bound to go through an examination.

I have considered this matter very fully, and I do not know at the end of what time I am to assume his want of legal knowledge.

I am not at liberty to refuse the application.

NOTE.—*Anon.*, 16 Jur. (O. S.), 222; *Ex parte Leith*, 7 W. R. 578; 6 & 7 Vict. c. 73, s. 25.

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*March 5.*

The solicitor of a railway company, in his bill, charged 500 guineas, in a lump sum, for attendances and correspondences for a period of above one year. The bill was ordered to be taxed :—

*Held*, that the solicitor might supply a detailed statement of the items comprised in the general charge exceeding that amount, but that he could not increase his demand beyond 500 guineas.

THIS case came on before the Court upon a petition of “*The Great Northern and Western of Ireland Railway Company*,” praying for a review of the taxation of the bill of costs of Messrs. *Tilleard*, the former solicitors of the company.

Messrs. *Tilleard* had delivered to the company their bills of cost, containing the two following lump charges of 500 guineas each :—

“1856, June to August, 1857.—For attendances on the promoters on the formation of the company, and in promoting and passing the bill through parliament, including Mr. *Freeman's* journey in *Ireland* in *October*, 1856, all attendances on capitalists, engineers, contractors, subscribers and land-owners, arrangements with bankers for the deposit, attendances on the parliamentary agents, negotiations with *The Great Southern and Western of Ireland and the Midland Great Western of Ireland Railway Company*, and voluminous correspondence, the whole extending over the period between *June*, 1856, and *August*, 1857 . . . . £525

“1856, October.—Taking the reference, 105 miles, including all attendances connected therewith, and payments of railway fares from *London* and travelling expenses, and other incidental expenses and gratuities for information . . £525”

Messrs. *Tilleard* afterwards delivered a rider to the bill,

bill, containing the particulars and charges in detail in respect of these two general items. These particulars amounted in the whole to 1,246*l.* 16*s.* 11*d.*, of which 789*l.* 9*s.* 6*d.* related to the first lump sum, and 457*l.* 7*s.* 5*d.* to the second.

In 1860, the Court ordered the bill to be taxed, but, on that occasion, the Court held that the rider formed no part of the bill.

In the course of the taxation, the Taxing Master received the rider in support of the items; he taxed it, and allowed, in respect of the first lump charge, the sum of 521*l.* 8*s.* 6*d.*, and in respect of the second, the sum of 355*l.* 9*s.* 5*d.*

The Petitioners now submitted,—“That the Master ought not so to have received and taxed the rider in support of the two items of 525*l.*, and ought not to have allowed those sums or any part thereof, but that they ought to have been dealt with on the footing of the bill alone, and ought to have been wholly disallowed.” They also objected, “that the rider was not referred to the Master for taxation, either by the order or otherwise, and that the two items in the bill did not nor did either of them contain a sufficient specification of the work and charges in respect of which the two sums of 525*l.* were respectively claimed, to entitle such sums or either of them to be allowed.”

Another objection to the certificate arose out of the following circumstances:—Originally six Irish lines had been projected by the promoters of this company; but after the preliminary expenses had been incurred, four of them had been abandoned, and an act was obtained (20 & 21 Vict. c. xxxiv) authorizing the construction of two only of the lines. The 52nd section provided, that

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"the expenses, costs and charges of obtaining and passing this act and preparatory thereto shall be paid by the company." In relation to this, the Petitioners objected as follows :—

"That the Master has allowed several items of charge for work done and services rendered, and for expenses incurred by Messrs. *Tilleard*, not only before the passing of the company's act of incorporation, but prior to the formation of the company and to any subscription contract being entered into for the formation thereof, and has also allowed several items of charges and expenses relating, for the most part, to the four projected lines of railway, which, though originally contemplated by certain promoters thereof, in connection with the two lines of railway for the making of which the company was formed and the subscription contract entered into, were abandoned by the promoters thereof prior to the formation of the company, and are not authorized by the company's act, and were never promoted or adopted by the company, nor by any body of directors or other managing body authorized to act on their behalf, and which charges and expenses were not incurred at the instance of or on behalf of the company, or by their direction or authority, or by the direction or authority of any managing body on their behalf."

The petitioners submitted, "that such charges and expenses are not 'expenses, costs or charges of obtaining or passing the company's act, or incidental or preparatory thereto,' within the true intent and meaning of the 52nd section of the company's act of incorporation, and that the funds of the company are not liable to pay the same; and that, therefore, the charges prior to the formation of the company ought to be wholly disallowed as against the company, and that the charges relating in part to the four abandoned lines of railway ought to be

be apportioned, with reference to the several lines of railway to which they so respectively relate; and that so much thereof as relates to the said four other lines of railway, as aforesaid, ought to be disallowed as against the company."

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Mr. *Baggallay* and Mr. *Martineau* in support of the petition. The taxation ought to have proceeded on the bill as delivered, which alone was referred for taxation, and without regard to the rider, which the Court has already decided formed no part of the bill. To allow the items in the rider to be taxed would be to permit a supplemental or new bill to be delivered, which has been repeatedly refused, and which can only be permitted upon a special application for that purpose. On such general charges nothing can be recovered at law or in equity. Thus, in *In re Pender* (a), one item of a solicitor's bill was:—"Attending Captain *Hodges* and Mr. *Lewis* a great many times in *London*; discussing this matter with them; making arrangements for procuring copies, deeds, &c., and expenses—2*l.* 10*s.*" Of this the sum of 1*l.* 3*s.* 4*d.* was struck off, on the ground that the only date given being *May* 28th, the Master could only allow for the attendance on that one day. Upon a petition to review the taxation, Lord *Langdale* observed:—"This bill having been submitted to taxation, the Master has struck out many items. As to the first charge of 2*l.* 10*s.*, 'for attending a great many times,' I must say that it is an item so expressed as, strictly speaking, to entitle him to no payment. A solicitor is not to make a general sweeping charge in his bill of costs for many attendances, but he must specify the very thing for which he makes his claim. It is said that he was detained in town several days. He might be so, but

(a) 10 *Beav.* 390; and see *In re Cullin*, 18 *Beav.* p. 519.

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but that is not the thing charged for ; and I do not think the Master would be justified in allowing what he has, if it had been objected to. If the business has really been done, the solicitor must thank himself if he has made out his bill in such a way as to prevent his charge being allowed."

The bill ought to specify distinctly the business done, in order that the client may know whether it is advisable to tax the bill or not. In *Ivimey v. Marks* (*a*), it was held, that an attorney is bound to specify, in his bill, as well every court, as the name of every suit, in which the business charged for was done. Such bill is an entire thing, and if the same bill blends charges for work done in a court of equity with charges for work apparently done in some court of common law, without pointing out which, the client cannot judge or be advised whether he should refer the whole bill for taxation, and the charges in the same bill for equity business, though correctly stated, cannot be recovered; *Cook v. Gillard* (*b*) ; *Pigot v. Cadman* (*c*).

But even if the solicitor be allowed to specify and explain the items of a general charge contained in his bill, he ought to specify items to the exact amount charged, and not bring in items of double the amount to be taxed, taking his chance upon which of them he can recover; *In re Lett* (*d*). Secondly. All the items in regard to the abandoned lines ought to be disallowed. They are not within the terms of the act, and there is no liability on the part of the company to pay them. The subscription contract (27th December, 1856) and the act (27th July, 1857) were for a different line.

Mr.

(*a*) 16 *Mee. & Wel.* 843.  
 (*b*) 1 *Ellis & B.* 26.

(*c*) 1 *Hurl. & N.* 837.  
 (*d*) 31 *Bew.* 488.

Mr. Selwyn and Mr. Pole were not called upon.

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*The Master of the Rolls.*

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I think the Taxing Master has come to a right conclusion upon both these matters. With respect to the two lump sums of 500 guineas each, I concur in the conclusion come to by Lord *Langdale* in the case of *In re Pender* (a), and I have always taken the same view in similar cases, that such a sum by itself and unexplained must be simply disallowed on taxation; but, I think, it is open to the solicitor who charges such an item to give evidence of what did really occur and how it is made up, but the evidence must be limited to what he really has done to earn the amount of that item. In addition to that, I am also of opinion, that before taking in such a bill for taxation, if it has not been previously explained, the client is entitled to have such an item explained, and it must be given to him for that purpose. If a solicitor puts a series of items amounting to 1,000*l.* in his bill, and, in brackets, says, I only charge 500*l.*, he cannot afterwards be allowed to charge more; but the client is entitled to have the items vouched for the purpose of showing that the items properly chargeable amount to 500*l.* in the aggregate. I concur that this rider is not part of the bill of costs; but yet it was properly before the Master. Before the taxation, the client says, I do not understand one of the items, and the solicitor gives him a letter of explanation; both parties are entitled to make use of that explanation before the Taxing Master. If it had formed part of the bill it was delivered in time. It appears that, on a former occasion, when taxation of the bill was asked, I held that these riders formed

no

(a) 10 *Bear.* 390.

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no part of the bill, and I am still of that opinion. If the question before the Taxing Master had been, whether the solicitor was entitled to augment the 500 guineas to 789*l.*, I think he was not at liberty so to do. The solicitor says, "I claim in respect of this item, 500 guineas. You ask for an explanation: you are entitled to one, and this charge of 500 guineas is made up of items in respect of which I insist I was entitled to charge 790*l.*, but I only charge 525." He does not alter his bill; the charge is still 525*l.*, and he cannot claim any more than that sum, but he is entitled to take all these items in and have them taxed for the purpose of shewing how he makes out that the 500 guineas is due to him. It was the reason why I directed the taxation of this bill, and if the Taxing Master had allowed more than 500 guineas upon it, I should have held that it was an improper allowance, and I should have disallowed the excess beyond the 500 guineas.

I am of opinion that the cases which have been cited do not shew that I ought to come to any different conclusion in this case. The case of *Irving v. Marks* (a) does appear to me a very strong case; but if it is the law, that a solicitor cannot be allowed items in his bill of costs for law business done by him, because he has not stated the Court in which it was done, or because he has mis-stated it, or that the charge of a lump sum was an improper item, then I ought not to have directed the taxation at all. It would have been a reason for saying, that there could be no taxation of such a bill, and that the solicitor should be left to recover what he could by an action at law. I do not think any of the cases lead to that result, and the case that Mr. *Baggallay* has pressed strongly upon me of *Pigot v. Cadman* (b) only states this:—that where a client requires

(a) 16 *Mee. & Wels.* 843.(b) 1 *Hurl. & N.* 837.

requires his solicitor's bill of costs to be taxed, he is entitled to have the whole bill before him. Thus, in the present case, if Messrs. *Tilleard & Co.* had attributed the moneys paid to them on account (which appears to have been 5,000*l.* or 6,000*l.*) to the payment of particular items in the bill, or to the items of the bill down to a certain point, and had only delivered a bill for the rest, then the Court would have said, "that will not do, you must deliver the whole bill, and you must say how much you have received in respect of the whole of that bill." That was all that was decided in *Pigot v. Cadman*, and I have no doubt that the Court came to a right conclusion on that occasion. I am, however, of opinion that, upon an ambiguous or a lump item, a client is entitled to receive an explanation before the bill is taxed, and even if he does not, the solicitor may offer it. On the taxation, though the solicitor cannot alter the amount claimed, he is still at liberty to use the explanation given to his client by him; and he is bound by that explanation. In this respect, it appears to me, that the Master has come to a right conclusion.

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I also think that the Master is also right in respect to that which seems to be the most important part of this case, viz., in allowing the costs which were incurred by the solicitor in relation to the line from *Tallamore* to *Athlone* and from *Castlerea* to *Sligo*, which were preliminary matters. In the first place, a matter of this description ought to be treated liberally, and the clause in the Act says, "The expenses, costs and charges of obtaining and passing this act and incidental and preparatory thereto shall be paid by the company," that is, the costs incidental and preparatory to the passing of this act. Here were some landed gentlemen and proprietors, in various parts of *Ireland*, who considered that it would be very desirable to have four lines of railway

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connected and united together, but it was impossible to know which of them it would be desirable to have, without having a survey and examination made of the ground. They have all the projected lines examined, and they give notices with respect to four ; but, on reflection, they consider that only two are likely to pay, and they accordingly abandon the other two. Now I think, that, to a very great extent, the examination of where the railway ought to stop is incidental and preparatory to the passing the act. The determination of what places it ought to avoid, where it ought to stop and to what point it ought to continue, was, to some extent, incidental and preparatory to the preparation of the bill for the railway which was actually carried. But this requires a closer investigation. But I think it ultimately turns on this :—the acquiescence of the directors of the company. [His Honor then examined the facts and came to the conclusion, that the directors had, by their conduct and acquiescence, prevented themselves disputing the charges, and he dismissed the petition with costs.]

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*Re PAGE. (No. 2.)**April 20, 22.*

**M**R. *PAGE* had acted as the solicitor of Mr. *Freeman*, who died in *April*, 1861. After his death and upon the application of his executor, an order had been made to tax Mr. *Page's* bill of costs. In taxing the bill, it appeared that a mortgage to a benefit building society of property in *Middlesex* had been paid off by his client.

Mr. *Page*, finding that documents not under seal could not be registered at the *Middlesex Registry Office*, prepared a short deed of reconveyance to be prepared in order to register it. This was executed and registered accordingly. By the Benefit Building Societies Act (6 & 7 Will. 4, c. 32, s. 2), a mere receipt endorsed on the mortgage reverts the estate.

In the taxation, the Master only allowed the solicitor the expense of a receipt on the mortgage, thinking the reconveyance unnecessary. The question as to propriety of the disallowance now came on for discussion.

Mr. *Selwyn* and Mr. *Bury*, for Mr. *Page*, argued, that the expense, having been *bona fide* incurred for an act necessary for clearing the title, ought to be allowed.

Mr. *Baggallay* and Mr. *A. Smith* argued, that the deed was unnecessary, and that to allow the costs of it would be to defeat the benefit intended to be given to members of Benefit Building Societies by the Act.

*The*

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I am of opinion that the Taxing Master is wrong as to this item. It is not competent for the Taxing Master to enquire whether the business could have been done in a better way. If an action at law had been brought and judgment obtained in a superior court and the Taxing Master thought that it ought to have been brought in the county court, is he at liberty to disallow the costs, when he has been merely directed by the Court to tax them? Suppose a bill were filed in this Court to administer an estate and the Taxing Master should be of opinion that it ought to have been by summons, could he disallow the costs?

I apprehend that in such cases the Court itself must determine such a question and give a special direction to the Taxing Master to tax the bill as if the action had been brought in the County Court or as if the suit had been commenced by summons. Such points can only be determined by the Court or in an action for negligence.

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*Re PAGE. (No. 3.)**April 20.*

**A**NOTHER point raised in the taxation was this :— Mr. *Page* had employed an auctioneer to sell his client's house property. The auctioneer had charged 85*l.* 5*s.* The amount had been retained by the auctioneer out of the deposit, but it was included as an item in the solicitor's cash account.

The Taxing Master thought that the solicitor ought to have made some arrangement with the auctioneer previous to his employing him, and he allowed the solicitor only 47*l.* 18*s.*, this being the amount which, according to the regulated scale, would be allowed in bankruptcy. (See Bankruptcy General Orders of 19th *May*, 1855, Schedule.)

This charge of 85*l.* 5*s.* included the printing, advertising and all other expenses, and was computed at 5*l.* per cent. up to the first 500*l.* purchase-money and 2*l.* 10*s.* per cent. on the remainder. This, from the evidence of several auctioneers, was said to be the usual charge in the trade ; some said up to 1,000*l.*, but most up to 2,000*l.*, in the absence of any express stipulation. One said his charge was 5*l.* per cent. up to 1,000*l.* and 3*l.* 10*s.* per cent. up to 2,000*l.*

A solicitor had employed an auctioneer to sell some property for his client. He however made no previous arrangement as to the amount of his remuneration, and the auctioneer had retained, out of the deposits, more than would be allowed under the bankruptcy scale :— *Held*, reversing the decision of the Taxing Master, who had merely allowed the amount according to the scale in bankruptcy, that the whole charge ought to be allowed to the solicitor.

Mr. *Page* said he had allowed the charge to the auctioneer in the usual course, and that he never received or had any control or power over the deposit, as it had been paid into the hands of the auctioneer. He now asked that the Master might review his taxation as to the 37*l.* 7*s.* taxed off.

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*March 6.  
April 16.*

On questions as to the extent of the authority of an agent, the same rules of law and equity apply to boards and public companies as to individuals.

A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification), and an acceptance (also specifying no limitation or qualification), is a contract for the whole.

The Defendants advertised that offers would be received for old Portland stone of Westminster Bridge. The Plaintiffs made an offer for the stone of a particular quality, which was accepted:—

*Held,* that this was a contract for the purchase of all the stone of that quality.

## THORN v. THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS.

BY this suit, the Plaintiffs sought to compel the Commissioners of Works and Public Buildings specifically to perform a contract entered into between them and a gentleman of the name of *Thomas Page*, as the agent of the Defendants, to sell to the Plaintiffs the arch stone, the spandrill stone and the *Bramley Fall* stone contained in the old *Westminster Bridge*, which had been pulled down by the direction of the Defendants and under the authority of an act for that purpose.

The case arose under the following circumstances:— In August, 1853, an act was passed (a), the object and effect of which was fully and accurately expressed by its title, viz., “An Act to transfer Westminster Bridge and the Estates of the Commissioners of Westminster Bridge to the Commissioners of Her Majesty's Works and Public Buildings, and to enable such last-mentioned Commissioners to remove the present Bridge and to build a new Bridge on or near the Site thereof.”

The act contained all the powers and provisions necessary to enable the Defendants to effect the purposes so specified in the title of the act, and it was not disputed that they had full power to sell and dispose of the materials of the old bridge in such a manner as they might think fit.

On the 15th of August, 1853, the Defendants appointed Mr. *Page* chief engineer, for the conduct and superintendence

(a) 16 & 17 Vict. c. 46.

superintendence of the necessary works, and the instructions given to him on his appointment contained nothing specifically pointing to the subject now before the Court. On the resignation of Mr. *Graham*, the resident engineer, on the 31st *August*, 1857, the Defendants, by their secretary, wrote to Mr. *Page* and authorized him to engage Mr. *Harris* as resident engineer of the works, subject to certain conditions, which were accepted by him and approved of by the Defendants. On the 19th *May*, 1860, an advertisement appeared in the *Times* newspaper, which was in the words following :—

“ *Old Westminster Bridge*.—Offers will be received for the old *Portland* stone, *Bramley Fall* stone and rough rubble of this bridge. Apply to Mr. *Harris*, resident engineer at the works.”

This advertisement was inserted by Mr. *Page*, and on the 21st of *May*, 1860, the Plaintiffs wrote a letter to Mr. *Page* in the words and figures following :—

“ Sir,—I beg to offer for *Westminster Bridge* stone—ninepence per cube foot for the arch stone, four ditto ditto ditto spandrill ditto, six ditto ditto ditto *Bramley Fall* ditto, you filling the barges and delivering alongside our wharf.

“ I have the honor to be your obedient servants,  
“ *P. Thorn & Co.*”

On the 28th of *May*, 1860, Mr. *Page* authorized Mr. *Harris* to accept the offer of the Plaintiffs.

The stone was in part delivered to the Plaintiffs ; but disputes having arisen, the Defendants refused to continue the delivery of the rest. The Plaintiffs thereupon filed this bill on the 2nd of *September*, 1862, which prayed that the Defendants might be decreed to specifically perform the agreement for the sale to the Plaintiff's

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tiffs of all the arch stone, spandril stone and *Bramley Fall* stone contained in old *Westminster Bridge*. 2. That the Defendants might be restrained from selling any of such stone to any other person. 3. That the damages caused by the breach of the agreement by the Defendants might be assessed and paid.

At the hearing five questions were raised. First, whether Mr. *Page* had authority to enter into the contract. Secondly, whether there was a binding contract. Thirdly, whether it comprised all the stone of the specified quality. Fourthly, whether the Plaintiffs had, by subsequent conduct, forfeited their rights. Fifthly, whether the Plaintiffs had abandoned their contract.

*Mr. Selwyn* and *Mr. Swanston* for the Plaintiffs.

The Solicitor-General (*Sir R. Palmer*) and *Mr. Hanson*, for the Defendants, cited *Harnett v. Yeilding* (a); *Pooley v. Budd* (b); *Pollard v. Clayton* (c).

#### *The MASTER of the ROLLS.*

*April 16.* There are, I think, five questions to be considered in this case. The first is, whether Mr. *Page* was the agent for the Defendants for the purpose of entering into any contract with the Plaintiffs for the disposal of this stone. If this be decided in favor of the Defendants, the consideration of any further question is immaterial; but if this be decided in favor of the Plaintiffs, the next question to be considered is, whether what took place between Mr. *Page* and the Plaintiffs amounted to a contract with

(a) 2 *Sch. & Lef.* 549.  
 (b) 14 *Bent.* 34.

(c) 1 *Key & J.* 462.

with them; and thirdly, if it did, whether, according to the true construction of that contract, the Plaintiffs are entitled to purchase the entirety of the stone of the three descriptions arising from old *Westminster Bridge*. If these questions are decided in favor of the Plaintiffs, then arises a further question, whether the Plaintiffs have not forfeited all interest in the contract, by reason of the irregular manner in which they have performed, or rather, failed to perform their part of it; and *fifthly*, and lastly, whether the Plaintiffs have not abandoned the contract, or at least acquiesced in the repudiation of it by the Defendants.

His Honor referred to the evidence on the first point, and said :—

Upon this evidence, I am of opinion that it is not possible for the Defendants to maintain their contention, that Mr. *Page* was not their agent for the purpose of entering into this contract with the Plaintiffs. It is obvious that if, instead of being a public government board, the case had been that of a private individual rebuilding one bridge and removing an old one, and employing an engineer for that purpose, and that these facts had occurred, no court of law or equity would afterwards have permitted him to repudiate such a contract and to deny the authority of the engineer as his agent. I am of opinion that, in a matter of this description, a public government board cannot be treated in any different manner from that in which a private individual would be dealt with. Whether it be a private individual, or whether it be a private or a public company, or whether it be a government board, the same rules of law and equity, as I apprehend, apply to all alike, and persons dealing with them are not only bound by the same obligations, but are also entitled to the same rights, and to rely on the same principles. The first point, therefore

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fore, must, in my opinion, be decided in favor of the Plaintiffs.

The second question, it is clear, must be decided in favor of the Plaintiff. Both Mr. *Page* and Mr. *Harris* concur with the Plaintiffs on this subject, and the passages I have read prove that the offer of the Plaintiffs, such as it was, was simply accepted without condition or qualification or reservation.

The third question is, what the offer was which was so accepted. This depends on the construction to be put on the original advertisement and the tender of the Plaintiffs following it, by the acceptance of which by the Defendants, through their agents Mr. *Price* and Mr. *Harris*, without the imposition of any conditions or limitations whatever, the contract is created. The Plaintiffs contend that this means the whole of the stone of the kinds mentioned in their offer; the Defendants contend that it means only so much stone as they may think fit to let them have.

This point, I am also of opinion, must be decided in favor of the Plaintiffs. In the first place, the words of the advertisement are general:—"Offers will be received for the old *Portland* stone, &c.," that is, offers will be received for all or any part of the *Portland* stone, &c. It would, no doubt, have been open to any person making a tender to offer to take a portion of what was offered only, specifying what portion he desired to take; and accordingly, the Plaintiffs offered to take the arch stone, the spandril stone and the *Bramley Fall* stone only, and made no offer to take the rough rubble. But their offer, which follows the advertisement in the generality of its terms, is, to take *Westminster Bridge* stone of the description and at the prices I have already mentioned.

mentioned. I think this means the whole of such stone. If it does not, it is plainly no contract at all for anything; for the vendors could immediately afterwards have said: "our contract means that we accept your offer only for as much as we choose to let you have," though the Plaintiffs might, as the fact is, have been put to great expense to enable them to perform the contract, in the belief that their offer to take the entirety of the stone had been accepted, the delivery of one ton, or even one cwt. of stone, would have satisfied the contract. And again, on the other hand, unless the Plaintiffs had contracted to take the whole, it is plain that the converse objection would apply, and that the vendors might say, on the faith of your taking the whole, "we have accepted your offers and rejected others which would have enabled us to dispose of it, and now, when you have taken a ton of each sort, and when the price of this sort of stone has fallen, you refuse to take any more." I think neither of these contentions could be supported. I think it also impossible that anyone could hold the contract to be wholly one-sided, and that it meant: "you, the Plaintiffs, must take the whole, if we, the Defendants, choose to require it; but you are not entitled to require us to let you have any more than we desire." Such a contract, which gives to one party all the advantage of a rise in the price of the article sold, and none of the disadvantage of a fall in the price of it, obviously could not be supported without express words, and would certainly make most persons very reluctant to enter into any dealings with a government board. It follows, therefore, that, in my opinion, the true construction of the contract is, an offer to take the whole of such stone, and an acceptance of that offer, which compels the Defendants to deliver the whole of that stone. Unless it means this, it means nothing, and the contract is merely idle and illusory. In that case, the advertisement

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is a mere delusion, and the acceptance by the Defendants of the Plaintiffs' offer amounts to nothing.

This is not a subject on which, in my opinion, the evidence of the custom of the trade is very material, for common sense, as well as common justice, points out, that a proposal to receive tenders for certain things to be sold, specifying no limitation or qualification, and a tender accepted to buy these goods, also specifying no limitation or qualification, must have a meaning; but that meaning must include the whole, as no limit can be placed upon it, nor can any line be drawn that would not be plainly arbitrary between the whole and what amounts practically to nothing. The evidence, however, on this subject, as was to be expected, fully confirms the Plaintiffs' contention, and shews, that, according to the custom of the trade, when the old materials of a building about to be removed are offered for sale without reserve as to the quantity, the whole is understood by vendor and purchaser to be included in the offer to sell, and the whole is understood, in like manner, to be included in the tender to purchase.

The Defendants take a distinction of this description:—they say that a large portion of this stone was worked up in the construction of the new bridge, and that this was not intended to be sold, and that the Plaintiffs never made any complaints of its being so used, and yet that, if the contract include the whole of the stone, it would also include the portion so used by them, under the direction of *Page* and *Harris*, in the construction of the new bridge. But this does not appear to me to destroy the true construction of the contract or invalidate the Plaintiffs' contention. In the first place, the fact is not clearly established in the evidence, and the Plaintiffs' affidavit asserts, that it was only a portion of the flag stones which were so used; but assuming

assuming the fact to be as stated by the Defendants in their answer, this would not alter the true construction of the contract, it would rather fall within the head I have shortly to consider, viz., that of acquiescence of the Plaintiffs in the rejection of the contract by the Defendants; but in truth I think it cannot be so treated, but must be regarded simply in this light :—although we, the Plaintiffs, are entitled to the whole of this stone under the contract, yet, if you want a portion of it for the construction of the new bridge and the prosecution of the works, we shall make no objection. All which might be done tacitly without any arrangement being expressly come to for that purpose.

I now come to consider the fourth point, which is prominently brought forward by the Defendants and on which a considerable amount of evidence, principally documentary, has been put forth. The effect of it may be shortly stated to be, that the Defendants were dissatisfied with the manner in which the Plaintiffs performed their engagement, that, in consequence, they declined to let them have any more stone.

Upon carefully considering the facts proved before me on this part of the case, the difficulty in which the Plaintiffs were placed, with regard to their double relations with the Defendants and the continued supply of stone to them by Mr. *Page* up to the month of *April*, 1862, I think, that the forbearance of the Plaintiffs in overlooking the occasional violations of the contract by the Defendants, and delaying to file this bill till *September*, 1862, cannot be imputed to the Plaintiffs as any acquiescence in the repudiation of the contract by the Defendants, or as sufficient to constitute a bar to the relief which they ask, except so far as regards any account for the stone sold through *Eversfield & Home* prior to the 12th of

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*April, 1862.* After the 12th of *April, 1862*, undoubtedly, the Plaintiffs were at arm's length; but, within five months after that time, the bill is filed, and after the 12th of *April, 1862*, a correspondence went on between the Plaintiffs and the Defendants, the former endeavouring to induce the Defendants to withdraw their refusal to deliver any more stone. This correspondence is not concluded till the 24th *June, 1862*, and this bill is filed on the 2nd *September* following. I am of opinion that this is not, in these circumstances, any delay which ought to preclude the Plaintiffs from obtaining the relief they seek in this Court, and to which, in my opinion, they are entitled.

To sum up the conclusions which I have arrived at, I am of opinion, that the advertisement of Mr. *Page* and the written offer of the Plaintiffs was unconditionally accepted by him and constituted a valid and binding contract between the Plaintiffs and Mr. *Page*, so far as he was able to make one on behalf of the Defendants. I am of opinion that Mr. *Page* was acting within the scope of his authority, as agent of the Defendants, when he entered into that contract, and that they are bound by it. I am also of opinion, that, by the true construction of that contract, the Defendants were bound to deliver to the Plaintiffs, and that the Plaintiffs were bound to take from the Defendants, at the prices mentioned in their tender, all the stone of the old *Westminster Bridge* of the three descriptions mentioned in their tender; and further, I am of opinion that the Plaintiffs have not forfeited their right to have this contract enforced, by reason of the irregularities in payment mentioned in the answer, or by reason of their not having sooner sought the aid of this Court, although I am of opinion that they have waived their right to any relief in respect of the damage sustained by them prior

prior to the 12th *April*, 1862, by reason of the occasional violation of the contract by the Defendants.

Decree specific performance and grant the injunction as prayed. Take an account of damages sustained by Plaintiffs since the 12th *April*, 1862, by reason of the breach of the agreement by the Defendants, and also the costs of the suit, unless, as in some of these cases, I am precluded from giving them by statute.

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### DREW v. LOCKETT.

**A**T the close of the year 1852, the Plaintiff, who was then Miss *Odell* and residing with her stepfather, the Defendant *Lockett*, was entitled to two undivided fifth parts in certain freehold and copyhold hereditaments, a part of which were in question in this suit. Her stepfather, Mr. *Lockett*, was entitled to two other undivided fifth parts in the same hereditaments, and his daughter Miss *Lockett*, now Mrs. *Ayres*, was entitled to the remaining one-fifth. In January, 1853, Mr. *Lockett* was desirous of borrowing some money on the security of his share in the property, to facilitate which the Plaintiff consented to join with him and to make her share of the property also liable for the sum advanced. Accordingly, on 21st January, 1853, an indenture of mortgage was executed by and between Mr. *Lockett* of the first part, the Plaintiff of the second part, Mr. *Smithenden* of the

April 20, 22.  
May 28.

A surety who pays off a debt for which he became answerable is entitled to all the equities which the creditor could have enforced and that, not merely against the principal debtor, but also against all persons claiming under him.

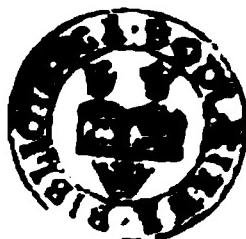
*A.* mortgaged his estate to *C.*, and *B.* became *A.*'s surety for the debt.

Afterwards *A.* mortgaged the estate to *D.*, who had notice

of the first mortgage. The first mortgage was subsequently paid off, partly by *B.*, the surety, but *D.* got a transfer of the legal estate:—*Held*, that the surety had still priority over *D.* for the amount paid by him under the first mortgage, as surety for *A.*

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third part, the Defendant *Thomas Scorder* of the fourth part and Mr. *Evans* of the fifth part, whereby Mr. *Lockett* mortgaged his undivided two fifth parts to Mr. *Evans* to secure the sum of 2,000*l.*, and the Plaintiff also mortgaged and charged her undivided two fifths in the same hereditaments unto *Richard Evans* for further securing to him the sum of 2,000*l.* which had been advanced by *Evans* to *Lockett* on the security of the two fifths belonging to Mr. *Lockett* in the hereditaments. It was proved that Miss *Odell* joined with Mr. *Lockett* in the execution of this indenture as a surety only. This was shewn by the deeds themselves, and also by the recital in the subsequent deed of the 24th *December*, 1855, which was distinct on the point. She received no part of the money advanced to Mr. *Lockett* and derived no benefit therefrom. In *April*, 1853, the Plaintiff married her present husband, the Defendant *Robert Drew*, and thereupon a settlement was made of the Plaintiff's property, bearing date the 26th of *April*, 1853. On the 3rd of *July*, the Defendant Mr. *Scorder* had notice of the existence of this settlement and of the rights and interests of the Plaintiff and her children under it. Subsequently to this, Mr. *Lockett* made a further mortgage of his interest by deeds of 26th of *August*, 1853, in favor of Miss *Charsley*, which was further secured by an indenture bearing date the 24th of *December*, 1855, presently mentioned. This mortgage was now vested in the Defendant *Thomas Sworder*, under an indenture of transfer of the 24th of *June*, 1858. In addition to this, the Defendant *Lockett* executed various other charges and incumbrances affecting his two fifths in favor of the Defendant *Thomas Sworder*, to secure to him sums of money advanced by him to the Defendant *Lockett*.

In 1855, *Evans* being desirous of realizing his mortgage

gage security, a portion of the hereditaments included in his mortgage was sold to Mr. *Abel Smith*, and was conveyed to him by an indenture, bearing date the 24th of December, 1855, but in fact executed on 28th *March*, 1856. What was sold was the two-fifths belonging to the Defendant *Lockett* in this portion, the two-fifths of the Plaintiff and the remaining one-fifth which belonged to Miss *Lockett*, the lady who was now the wife of *Benjamin Ayres*. All the persons interested in these shares and all the incumbrancers upon them were made parties to the deed, and all executed it except Miss *Lockett*, who was at that time an infant, and who was to execute it and receive her one-fifth of the purchase-money, providing, on attaining twenty-one, she assented to this sale of her share. The amount of the purchase-money, after certain deductions, was 4,385*l.* The amount of the share of the purchase-money belonging to the Defendant *Lockett* in respect of his two-fifths, and also of the Plaintiff's share of the purchase-money in respect of her two-fifths in the property sold, was each the sum of 1,754*l.*; but Mr. *Evans*, the mortgagee, required to be paid in full the total amount due to him, which the two-fifths of the purchase-money belonging to Mr. *Lockett* would not discharge. The consequence was, that 394*l.* 3*s.* 8*d.* had to be taken from the two-fifths of Plaintiff's share of the purchase-money, and this was done and paid to *Evans* accordingly, for the purpose of paying him, in full, all that was due to him for principal and interest. Accordingly, he was then fully paid off; and as regarded the remainder of the property included in his mortgage, he was a trustee for the rightful owners.

By an indenture of even date, to which the Plaintiff was not a party, *Evans*, the mortgagee, by the desire of *Lockett*, conveyed to Miss *Charsley* all the undivided

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two fifths parts or shares of the Defendant *Lockett* in the remainder of the property included in the mortgage of *January, 1853*, but not included in the sale to *Smith*, as a further security for the sum advanced by her, and at the same time, by this instrument, he conveyed the legal estate in these hereditaments to her. All these charges, together with the legal estate in the hereditaments, were now vested, by assignment and conveyance, in the Defendant *Sworder*, and the question the Court had to determine was, whether the Plaintiff was entitled, by virtue of her having been a surety only to secure the sum of 2,000*l.* lent to *Lockett*, to stand in the place of *Evans*, the mortgagee, as against the two-fifths of *Lockett* in the remaining property not included in the sale to *Smith*, and so conveyed to Miss *Charsley* as before stated by the deed of even date, and whether the Plaintiff was entitled to have, as against this remaining unsold portion of the mortgaged property, the same rights and securities as *Evans* had, in order to enforce payment of the 394*l. 3s. 8d.*, being the balance of the purchase-money of her undivided two fifths share in the said property which were sold, and which balance was retained for the purpose of paying the mortgage-debt due to *Evans*.

Mr. *W. R. Ellis*, for the Plaintiff, cited *Lancaster v. Evors*(a); *Stansfield v. Hallam*(b); *Praed v. Gardiner*(c); *Sugden's Vend.*(d).

Mr. *Southgate* and Mr. *Marten*, for the Defendant, referred to *Copis v. Middleton*(e); *Williams v. Owen*(f); *Farebrother v. Wodehouse*(g).

Mr.

(a) 10 *Beav.* 154.(b) 29 *L. J. (Ch.)* 173.(c) 2 *Cox*, 86.(d) *Page* 1010 (11th edit.)(e) *Tur. & Russ.* 224.(f) 13 *Sim.* 597.(g) 23 *Beav.* 18.

Mr. *Ellis*, in reply, referred to *Lake v. Brutton* (*a*).

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*The Master of the Rolls.*

The question is, whether the Plaintiff and the parties claiming under the settlement of the 26th of April, 1853, have a right to be paid the 394*l.* 3*s.* 8*d.* out of *Lockett's* share, in priority of *Sworder*, the transferee of the second mortgage of the 26th of August, 1852.

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The general right of a surety to stand in the place of the creditor, who has been paid off, is not disputed; *Lancaster v. Evors* (*b*) and many other cases establish it, and the general right is not questioned. But, on behalf of the Defendant *Sworder*, it is insisted, that this right is confined to the right as between the original creditor and the principal debtor, and that it does not extend to the case where subsequent incumbrances have been made by the principal, so as to deprive such subsequent incumbrancers of their security, and that as, in this case, on the 26th August, 1853, *Lockett* mortgaged his undivided two-fifths, subject to the mortgage to *Evans*, to Miss *Charsley*, to secure a sum of 728*l.*, which mortgage is vested in the Defendant Mr. *Sworder*, who acted as solicitor for the lady in that transaction, he is entitled to have that paid out of the two-fifths belonging to *Lockett*, against all persons except the mortgagee *Evans*, and the authorities which are relied on for this purpose are *Williams v. Owen* (*c*); *Bowker v. Bull* (*d*); and *Farebrother v. Wodehouse* (*e*) before me.

But

(*a*) 18 Beav. 34.

(*d*) 1 Sim. (N. S.) 29.

(*b*) 10 Beav. 154.

(*e*) 23 Beav. 18.

(*c*) 18 Sim. 597.

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But I am of opinion that none of these cases establish the proposition that would be necessary in order to maintain the contention of the Defendant. In the first place, all question of absence of notice of the first incumbrance and any right which might flow from being a purchaser for value without notice may be disregarded in the present case. No such questions arise here, the prior mortgage to *Drew* was well known to the subsequent mortgagees, and it was subject to that charge that the subsequent mortgages were created. The utmost that any of those cases have gone appears to me to be this:—that as the surety knew that if the mortgagee, the payment of whose debt he guaranteed, advanced any further money to the mortgagor on the security of the same property, he would be entitled to tack the second mortgage to the former, and that he could not be compelled to reconvey the property until both mortgages were satisfied, so the surety cannot insist on interposing between the two securities, and put himself in a better situation than the person for whom he became surety. That he cannot insist on being a first mortgagee before the second mortgagee, if he tender the money sufficient to pay off the first mortgage, and thus endeavour to exclude the second charge created in favour of the original creditor. The validity of these decisions is not now the question before me, but they stand on a separate ground, and it is to be observed, that this right of a first mortgagee to tack further advances is a matter which the surety might prevent by a stipulation in his original contract, that his suretyship for the first charge should cease and determine in case he, the mortgagee, should advance further sums on the security of the same property without the consent of the surety. But even this exception from the rule can only apply in cases where the first mortgagee has made his subsequent advance

advance in ignorance of any other charge having been made by the mortgagor on the same property in favour of any other person. In other words, it is only in cases where the first mortgagee could tack his subsequent advance to his first mortgage, that he could apply this exception to the doctrine. But if, after the mortgage, for the payment of which the surety is bound, the mortgagor should obtain money from another person on the security of the first mortgaged hereditaments, and if notice of that second mortgage should be given to the first mortgagee, then no further advance made by him to the mortgagor could be tacked on to his first mortgage, nor could the right of the surety to stand in the place of the first mortgagee, in respect of his first mortgage when paid off, be contested, in case the surety advanced any money for that purpose, unless, in the solitary case, where the first mortgagee advanced further money on the same security, without knowledge or notice of any charge prior to his second advance.

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I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor, whose debts he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him. It is to be observed, that the second and any subsequent mortgagee is in no respect prejudiced by the enforcement of this equity; when he advances his money he knows perfectly well that there is a prior charge on the property, and if he thinks fit to advance his money on such security, it is his own affair, and he cannot afterwards with justice complain. The amount being limited, it is a matter of indifference to him whether the first mortgagee or the surety is the prior claimant for that amount, and it would be, in my opinion,

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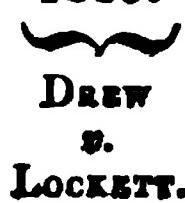
a violation of all principle if, when the surety pays off the debt, he were not to be entitled, as against the principal debtor and those who claim under him, to be paid the full amount due to him.

In this case both Miss *Charsley* and the Defendant *Sworder* knew that the two-fifths of *Lockett's* were mortgaged for 2,000*l.* and interest; it was subject to that charge that they advanced this money; but now the Defendant *Sworder* seeks to make out that the charge is 394*l.*, less than that sum; nay more, for the Defendant, who is consistent and logical in his contention, accordingly insists, that the Plaintiff ought to contribute one-half of the first mortgage debt, as if she had originally received one-half of the money advanced by *Evans*. In this case, suppose the Plaintiff to have paid off *Evans* and to have taken a transfer of his mortgage securities, it is plain that no conveyance or release could have been obtained from her until she was repaid the full amount of the debt due to her in respect of *Evans'* mortgage. The legal estate vested in *Sworder* in the unsold portion of the mortgaged hereditaments cannot, in my opinion, avail him; he cannot thereby convert his mortgage, which was subject to the 2,000*l.* and interest included in the first charge, into a charge having priority over that 2,000*l.*, either as against *Evans* or as against any person entitled to stand in his place. If he cannot as to the whole, so neither can he do so as to any portion thereof, and that is what he now seeks to do by his present contention. The case of *Willoughby v. Willoughby* (a), to which I frequently have occasion to refer (b), determines, that, in such circumstances, the legal estate does not put the person who gets it in any better situation than

(a) 1 *Term Rep.* 763. (b) See *Sharples v. Adams*, 32 *Beav.* 213.

than he stood in before. As regards all incumbrancers, of which he had notice before he advanced his money, they have priority over him, whether he has or has not got in the legal estate.

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The remaining points urged by or on behalf of the Defendant Mr. *Sworder* are equally untenable. In the 7th paragraph of his concise statement, he insists that the Plaintiff did not join in the mortgage merely as surety; that she was considerably indebted to Mr. *Lockett* for repairs &c. on the mortgaged property and for her maintenance, and that she joined in the mortgage to secure such moneys; and in addition to this, that a considerable portion of the mortgage money was raised for the purpose of being laid out in the repairs, &c., of which the Plaintiff has had the benefit.

This is not proved, but if every word of it were true, it would not entitle Mr. *Lockett*, or any one claiming under him, to contest the right he admitted, when he induced the Plaintiff to become surety for him to *Evans*, viz.: that she was to have all *Evans'* rights over again against him, *Lockett*, if she paid off *Evans* or any part of his debt. If Mr. *Lockett* has any claim against the Plaintiff in respect of improvement of the property or her maintenance, he must bring that forward in the ordinary way, although, in the circumstances of this case, after the lapse of time which has occurred, it is difficult to see how such a claim could be supported; but even if supported to the fullest extent, it could not, in respect of it, give him a charge on her property, or any right to be paid out of the produce of the sale of it, unless upon a clear contract for that purpose, entered into by Miss *Odell*, after admitting his claim and knowing

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knowing what she was about. It is not suggested that any thing of the sort occurred here.

A case is also attempted to be made out by Mr. *Sicorder* against the Plaintiff of acquiescence on her part; but I am of opinion that no such case is established, nor after the settlement of her share in *April*, 1853, could it, even if established, be of any avail as against any thing except her separate estate for life in the property settled.

I am of opinion, on the whole of this case, that the Plaintiff is entitled, in this Court, to the first charge on the hereditaments left unsold in *March*, 1856, and conveyed by *Evans* to Miss *Charsley*, exactly in the same manner as if the 39*4L* 3*s.* 8*d.* taken from the Plaintiff's share of the two-fifths of the purchase-money had not been paid to *Evans*; as if his mortgage had not been paid off in full, but that amount was still due to him.

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*May 6, 26.*  
*June 8.*

THE first of these suits was instituted by a tenant in tail to make the estate of a prior tenant for life, who was impeachable for waste, liable for acts of waste committed in his lifetime. The second was for the administration of the estate of such tenant for life.

The estate was derived from the Rev. *Walter Bagot*, who, by his will, dated the 4th of *May*, 1798, devised all his real estates, subject to a term of 1,000 years, for payment of debts, legacies, &c., to his eldest son *Egerton Arden Bagot* for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of *Egerton Arden Bagot* successively in tail male, with similar limitations in favor of each of the testator's other sons, *Walter, William, Harvey, Humphrey and Ralph*, successively, for life, and of their respective issues in tail male, with an ultimate remainder to the right heirs of the testator. The will contained no provision to exempt the several tenants for life from impeachment for waste.

The testator died in *July*, 1806.

*Egerton* inheritance for the advantage

of the property, cannot be worked by a succeeding tenant for life.

After a long delay in taking proceedings against a tenant for life in respect of waste, the Court endeavours to deal liberally towards him.

When a tenant for life impeachable for waste, improperly, knowingly and wilfully commits waste, he cannot derive any benefit from the timber cut.

As to the time from which interest is chargeable against a tenant for life who commits waste.

If a tenant for life commit waste, the produce does not belong absolutely to the first tenant in tail in esse while there is a possibility of prior tenants in tail coming into esse. *Semblé*.

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*Egerton Arden Bagot*, thereupon, entered into possession of the real estates, and he continued in possession down to his death in *February*, 1861. Prior to this time, the testator's sons, *Walter*, *William*, *Harvey* and *Humphrey*, had died without issue male, and at this time, the estate stood limited to *Ralph Bagot* for life, with remainder to his son (the Plaintiff) *William W. Bagot* in tail. The latter was an infant, having been born on the 24th of *January*, 1847.

*Egerton Arden Bagot* had, by his will, after reciting the will of his father, devised certain hereditaments of his own to *Ralph Bagot* for life, with remainder to his first and other sons in tail male; and he discharged his paternal settled estates, and all persons entitled thereto, "from all sums of money, claims, rights and interests, to which he had become entitled previously to the date of his will, in consequence of his having discharged or purchased any incumbrances affecting the said paternal estates, or purchased leasehold interests granted out of or affecting the same." And he declared, that if any person taking any interest under his will in his estates should, in any manner, dispute or call in question any of the dispositions of that his will, or make any claim against his estate, in respect of any dealings or transactions which had taken place with or in reference to paternal settled estates, that then he should forfeit his estate. He also, by codicil, directed that the amount of any such claim, if established, should be paid one of the incumbrances on his paternal estates, which had been paid off by him and out of his own devised estates.

The first suit was instituted in *April*, 1862, by *William W. Bagot*, the infant tenant in tail, against his father, the tenant for life in possession, and the executors of

*Egerton*

*Egerton Arden Bagot.* The bill stated that "during the period when *Egerton Arden Bagot* was in possession, as tenant for life, of the real estates so devised, as aforesaid, by the will of *Walter Bagot*, he, from time to time, with full knowledge that he was impeachable for waste, committed divers acts of waste, by felling timber other than for necessary repairs, and by opening and working new mines and mines which had been abandoned, and mines which were not in a state of working at the death of the testator *Walter Bagot*, some whereof had never been worked by the testator or by any other person whilst he was in possession thereof, and others, if they had been so worked whilst he was in possession thereof, had nevertheless been abandoned or were lying dormant at his death, and that *Egerton Arden Bagot*, from time to time, sold the said timber and minerals, and obtained large sums of money as the proceeds thereof, which he applied to his own use, and thereby he amassed a very considerable fortune."

The bill prayed a declaration that the personal estate of *Egerton Arden Bagot* was liable to answer to the Plaintiff for all the benefit and profits received by him from the acts of waste, with interest from the periods they were respectively received, and it prayed an account of the timber improperly felled, and also of the coals and minerals gotten by him from mines under the estates which were unopened, abandoned or dormant at the death of *Walter Bagot*, the testator, distinguishing those prior to the Plaintiff's birth in 1847.

The executors of *Egerton Arden Bagot*, by their answer, said that their testator had granted several leases for his life of divers coal mines under the *Lancashire* estate, some of which were new and unworked, and that others

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others were lying dormant; and that he had felled timber on the settled estates; and that, to the best of their knowledge, he had received for coals from unopened mines, before the Plaintiff's birth, 7,923*l.* 15*s.* 4*d.*, and after his birth, 11,752*l.* 18*s.* 2*d.*; from dormant mines, before his birth, 9,759*l.*; after his birth, 1,375*l.*; for timber cut, 4,330*l.* 13*s.* 9*d.* They stated that none of the mines had, as they believed, been worked from 1775 to 1806, while *Walter Bagot*, the settlor, was in possession. They also stated their belief, that part of the timber, or the proceeds thereof, had been employed or expended in rebuilding, repairing and improving the estates, and they claimed to set off or retain all just allowances in respect of some incumbrances which had been paid off by *Egerton Arden Bagot*, together with the outlay and expenses he had incurred in rebuilding, and in repairs and improvements, which they alleged were far beyond what could have been required by a mere tenant for life. They also insisted on the clause of forfeiture and the benefit of the provision contained in the will and codicil of *Egerton Arden Bagot*.

Mr. Osborne and Mr. G. N. Colt for the Plaintiff. The estate of the tenant for life is clearly accountable for the waste committed; but a distinction must be made as to that prior to the Plaintiff's birth in 1847 and that subsequent. As to the former, the amount ought to be invested for the benefit of the parties entitled to the estate in succession, giving to the former tenant for life no benefit from his wrongful acts. As to the latter, the Plaintiff, as the owner of the first estate of inheritance, is entitled absolutely to the produce, and interest is chargeable on the amounts received from the time of their receipts. They cited *Williams v. The Duke of Bolton* (a); *Powlett v. The Duchess of Bolton*;

(a) 1 Cox, 72.

*ton (a); Whitfield v. Bewit (b); Lushington v. Bol-  
dero (c); Garth v. Cotton (d); The Duke of Leeds v.  
Lord Amherst (e); The Marquis of Ormonde v. Kyn-  
nersley (f); Bateman v. Hotchkin (No. 2) (g); Foley  
v. Burnell (h).*

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As to the dormant mines, it appears that the settlor entered into possession of the estate in 1775, and died in 1806, and that, during thirty-one years, none of the mines were worked. The dormant, or abandoned mines, are therefore in the same position as the unopened mines; *Viner v. Vaughan (i)*.

As to the alleged lasting improvements, they cited *Caldecott v. Brown (k); Dent v. Dent (l)*.

Mr. Hobhouse and Mr. Lewin for *Ralph Bagot*, the tenant for life in possession, argued that the money received in respect of the waste ought to have been invested; that the prior tenant for life, being a wrong-doer, was not entitled to any benefit from his wrongful act, and that therefore the fund ought to have been accumulated. That the present tenant for life was entitled to the income of the fund so accumulated prior to the birth of the tenant in tail; *Gower v. Eyre (m)*.

Mr. Selwyn, Mr. Baggallay and Mr. Rasch, for the executors of *Egerton Arden Bagot*, argued that no interest was payable on the amount received in respect of timber and minerals prior to the death of *Egerton Arden Bagot*, who was entitled to the rents and profits for life, and that, at the utmost, interest could only be chargeable

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|---------------------------------------------------------------------------------------------|------------------------------------------------------------------|
| (a) 3 Ves. 374.                                                                             | (f) 15 Beav. 10, n.                                              |
| (b) 2 P. Wms. 240.                                                                          | (g) 31 Beav. 486.                                                |
| (c) 15 Beav. 1.                                                                             | (h) 1 Bro. C. C. 274.                                            |
| (d) 3 Atk. 751; S. C. 1 Ves.<br>sen. 524; 1 Dick. 185; 1 White<br>& Tudor's Lead. Cas. 559. | (i) 2 Beav. 466.                                                 |
| (e) 14 Sim. 357; S. C. 2 Phil.<br>117; 20 Beav. 239.                                        | (k) 2 Hare, 144.<br>(l) 30 Beav. 363.<br>(m) Sir G. Cooper, 156. |

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chargeable from the filing of the bill. That after the great lapse of time (now fifty-four years) during which no complaint had been made, it was impossible to ascertain the circumstances under which the timber had been cut, that the trees might have been deteriorating, or have consisted of necessary thinnings, or windfalls, and that by cutting them, the estate might have been improved instead of injured, and those in remainder benefited thereby. That the only case in which interest had been given from the time of the receipt of the money derived from the sale of the timber was *Williams v. The Duke of Bolton* (*a*) ; but that must have been a special case, for Lord *Thurlow* considered it "a fraud on the settlement (especially considering the express words of the settlement)," besides the suit was for administration. But in the *Duke of Leeds v. Earl Amhurst* interest was only given from the death of the tenant for life, and in *Garth v. Cotton* it was only given from the filing of the bill.

That it might be said that the remainderman had lost the improved value by growth of the timber cut, but that could not apply to minerals, which were not improved by time.

That the acts of *Egerton Arden Bagot* were either rightful or wrongful ; if rightful, he was entitled to the income of the money produced, but if wrongful the remedy was by action at law and not by a suit in equity. They cited *Blake v. Peters* (*b*) ; *Ferrand v. Wilson* (*c*) ; *Gent v. Harrison* (*d*) ; *Clavering v. Clavering* (*e*) ; *Mildmay v. Mildmay* (*f*) ; *Phillips v. Barlow* (*g*).

Mr.

(*a*) 1 Cor, 72; 3 P. Wms. 267 n.; 3 Ves. 574.

(*b*) 31 L. J. (N. S.) Ch. 884; 32 L. J. (N. S.) Ch. 200, on appeal.

(*c*) 4 Hare, 344; S. C. 15 L. J. (N. S.) Ch. 41.

(*d*) John. 517; S. C. 29 L. J. (N. S.) Ch. 68.

(*e*) 2 P. Wms. 388.

(*f*) 4 Bro. C. C. 76.

(*g*) 14 Sim. 263; S. C. 14 L. J. (N. S.) Ch. 35.

Mr. Atkin, for the Hon. Honora Legge and other Defendants in the suit of *Legge v. Legge*.

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Mr. Osborne in reply; *Jesus College v. Bloom* (a); *Parrott v. Palmer* (b); *Wellesley v. Wellesley* (c).

### The MASTER of the ROLLS.

The object of this suit is to make the estate of *Egerton Arden Bagot*, deceased, liable for certain acts of waste committed by him on the family estates, when he was in possession of them as tenant for life. That his estate is liable to some extent is not disputed: the questions I have to determine relate to the extent of that liability, and the mode of application of the sums which will have to be paid in respect of that liability.

May 26.

The property was settled by the will of the Rev. *Walter Bagot*, made in the year 1798. By it he created a term of 1,000 years, the trusts of which were to raise money in aid of his personal estate, and also the sum of 1,800*l.*, which, under his marriage settlement, he was bound to pay, and subject thereto, he gave the estate in question to *Egerton Arden Bagot*, his eldest son, for life, with remainder to his first and other sons in tail male; and in default, to the second and every other son of the testator for life, with remainder to their first and other sons in tail male respectively, ending, in the event of failure of sons of all the prior tenants for life, to the Defendant the Rev. *Ralph Bagot*, the sixth son of the testator, for life, with remainder to his first and

other

(a) 3 *Atk.* 262; 1 *Amb.* 54; (c) 6 *Sim.* 497.  
(b) 3 *Myl. & K.* 632.

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other sons in tail male. As to no one of the estates for life given does his will contain any provision freeing the tenant for life from impeachment for any waste committed by him.

The second, third, fourth and fifth sons of the testator have all died without issue male during the life of *Egerton Arden Bagot*. The Plaintiff is the eldest son of the Defendant the Rev. *Ralph Bagot*; he is the heir in tail in remainder, and if he survives his father, and do not previously alienate his inheritance, he must necessarily be the heir in tail in possession.

The testator died in *July*, 1806. His eldest son *Egerton Arden Bagot* thereupon entered into possession of the settled estates, and he continued in such position down to the time of his death, which took place on the 4th *February*, 1861. The property consisted of the family mansion and estate in *Warwickshire*, and of an estate in *Lancashire* which was possessed of valuable minerals. I have already noticed that *Egerton Arden Bagot* had no power to commit any waste, and it is shewn that he was aware of his liability in this respect. Notwithstanding this restriction, he cut timber to a large extent, and he worked the minerals both by working old abandoned mines and by opening new ones.

With respect to the abandoned, or as they are called in the pleadings and evidence, "the dormant mines," I am of opinion that he is not shewn to have been guilty of any waste in working these. It is always a question of degree, to be established by evidence, whether the working of a mine which has been formerly worked is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months or

two years before he became possessed of the property, must still be considered to be an open mine. A mine not worked for a hundred years could not, I think, be properly so treated ; and my present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working of it, but which, from the rise in price of iron and coal, had become remunerative, might, without waste, be worked again by a succeeding tenant for life; but if the abandonment of the mine had taken place long ago, and if the owner of the inheritance had discontinued the working, with a view to some advantage to the property, which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, then I doubt whether a succeeding tenant for life could properly treat that as an open mine. I state my general view of this subject, but I doubt whether I have before me sufficient materials to enable me to come to a satisfactory conclusion on this point.

The opening also of a fresh pit may be, not the opening of a new mine, but only the more advantageous mode of working an old one, and may possibly be done without any injury to the inheritance, if the surface of the spot where it is opened be of no or little value to the estate. I am of opinion, therefore, that as to the mines, it may become necessary to direct an inquiry to the effect I shall presently state.

Again, on the subject of the timber, it does not necessarily follow that all cutting of timber is waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, i. e., every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land to which the tenant for life would be

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be entitled. So also, I apprehend, that proper and regular thinning of a wood, for the purpose of improving the rest of the trees within certain limits, would not amount to a waste. In one case (*Pidgeley v. Rawling* (a)) the Lord Justice *Knight Bruce* held, that the cutting of *Larch* trees twenty years old, for this purpose, was legitimately done by the tenant for life, and did not amount to waste. On the subject of the timber felled I am also left in the dark by the evidence, and on this subject also, I am of opinion that it may be proper to direct an inquiry, the terms of which I will presently state, unless by arrangement a different course can be adopted.

The next question argued before me relates to the mode in which the tenant for life should be made to account for the minerals improperly won by him, and also for the timber improperly cut by him. Two periods are insisted upon by the counsel for the Plaintiff, during which the timber was cut and minerals were won, which is, as they contend, governed by different principles, viz., the timber cut and minerals won before the 24th of January, 1847, when the Plaintiff was born, and the timber cut and minerals gotten subsequently to that period. With respect to the former period, they contend that the Plaintiff is entitled to the interest of the money derived from those sources; and with respect to the latter period, they contend that he is entitled to the money itself derived from the same, inasmuch as the Plaintiff was the first tenant in tail *in esse* when it was cut.

With respect to the claim of *Egerton Arden Bagot*, the tenant for life who cut the timber. I held in *Lushington*

(a) 2 Coll. 275.

*Lushington v. Boldero* (*a*), following *Garth v. Cotton* (*b*), and many other cases, that the tenant for life could not derive any benefit from the timber improperly, knowingly and wilfully cut by him. Upon reviewing the authorities I still retain that opinion, but at the same time, in considering the cases, it appears that, after a long time has elapsed before the bill has been filed, the Court has usually endeavoured to deal with the tenant for life in a very liberal manner, considering, and as I think justly considering, that, in most cases, it would not be for the benefit of the parties concerned to go into a long and expensive inquiry as to the nature of the timber cut and the circumstances under which it was cut. If this be a correct view as regards timber, it is manifest that the same consideration would apply to the getting of mineral, when there is such a complication of circumstances as exist in the present case, arising from the difficulty of deciding which were opened and which were unopened mines. Accordingly, in *Garth v. Cotton*, although the principle I have mentioned was broadly laid down by Lord *Hardwick*, he considered that, instead of any such inquiry, it would be better simply to give interest from the date of the death of the tenant for life, and a similar principle was acted upon in the case of *The Duke of Leeds v. Lord Amherst*.

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Here, the tenant for life was in possession of the property from *July, 1806*, till *February, 1861*, a period of fifty-four and a half years; no complaint was made or any opposition offered to him, during the whole of that period, as regards his dealing with the property as he thought fit, although any one of the tenants for life in remainder, or even the trustees to preserve contingent remainders,

(a) 15 Beav. 1.

(b) 3 Atk. 751; 1 Dick. 185,
and 1 Ves. sen. 524.

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remainders, might have done so. It is true that this negligence, on their part, does not affect the Plaintiff, who was not born till 1847 and is still an infant; but still, taking into consideration the family relations between these persons (a circumstance which Courts of Equity, not merely in the case of family agreements, but in many other cases, treat as a matter of moment and one to be regarded in dealing with questions between relatives), and having regard to the fact, that the father of the infant Plaintiff was one of the tenants for life, by whose desire, and I must also say properly, the present suit, I have no doubt, was instituted:—taking all these matters into consideration, I am disposed to act rather on the course adopted in *Garth v. Cotton* by Lord *Hardwicke*, than to enforce the strict right of the parties, after the delay and expense which would be occasioned by prosecuting the enquiries I should be otherwise compelled to direct. If, therefore, the Defendants, the executors of the tenant for life, will consent to adopt the accounts furnished by them as conclusive against the estate of their testator, I will declare, that the estate of the testator *Egerton Arden Bagot* is liable for 4,330*l.* 13*s.* 9*d.*, for timber cut on both estates, and for the sum of 19,676*l.* 13*s.* 6*½d.*, in respect of minerals won from unopened mines, but that his estate is not liable in respect of the minerals from the dormant mines; and I will then direct interest at 4*l. per cent. per annum* to be calculated on the two sums I have already stated (amounting in the whole to 24,007*l.* 7*s.* 3*½d.*) from the day of the death of the testator, and charge his estate with that amount. Against this, the estate of the testator will be entitled to set off any incumbrance affecting the estate, which would not properly have been paid out of the estate, under and by virtue of the term of 1,000 years created by the will of the Rev. *Walter Bagot*, deceased. I should then direct the amount,

amount, when paid, to be invested as part of the settled estate, and the interest thereof to be paid to the Defendant, the Rev. *Walter Bagot*, during his life, on the assumption that the waste had not been wrongful to this extent, viz., that the inheritance had not been injured thereby, and declaring the Plaintiff absolutely entitled to the money, subject to the life estate of his father therein.

If this be acceded to on the part of the advisers of the Plaintiff, I think that it would be proper, on the part of this Court, to accept this species of compromise on his behalf. If not, I should direct, first, an account of what minerals had been gotten and won by the late tenant for life *Egerton Arden Bagot* prior to the 24th *January*, 1847, distinguishing between such of the minerals as were gotten from old mines remaining dormant and from mines newly opened by him. In taking such inquiry, I should ascertain for how long and under what circumstances such mines had remained dormant or unworked, also, whether, with respect to the new pits sunk or opened, any were so sunk or opened for the purpose of facilitating the old workings, or for the purpose of opening fresh mines, and I should also state the circumstances under which such fresh workings were commenced. I should then direct a similar account as to the timber, distinguishing it as to the timber felled prior to the 24th *January*, 1847, and that felled subsequently, distinguishing also what parts of such timber, if any, were felled in the nature of thinings, and whether any and what parts of such timber were properly felled with regard to the benefit of the estate, and also take an account of what parts of such timber, if any, were employed in the repairs of the settled estate.

Upon the coming back of that account I should direct what should appear to be the amount of all
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timber improperly cut and minerals improperly gotten prior to the death of the Plaintiff to be invested as part of the settled estates, and the interest thereon since the death of *Egerton Arden Bagot* to be paid to the Defendant, the father of the Plaintiff. As to that improperly cut subsequently to the birth of the Plaintiff, I should declare the Plaintiff to be entitled to the proceeds, as the first tenant in tail, together with interest at *4l. per cent. per annum* on that amount, from the time when the same moneys were respectively received. As to all that which, on the inquiry, should appear to have been timber properly cut and minerals properly won, that is, by which the inheritance was not injured, but such as this Court would have directed, had an application been made to it by the tenant for life for that purpose, I should direct it to be invested as part of the settled estate, and treat *Egerton Arden Bagot* as entitled to the interest arising therefrom during his life, and, since his death, charge his estate with interest on it at *4l. per cent. per annum*, to be paid to the present tenant for life.

It is plain that it would be troublesome and probably most tedious and expensive to work out all these inquiries, and my opinion is, that the course I have above suggested, as one to be adopted in lieu of such inquiries, would be the best for all parties, the more so as, after the great lapse of time, I should take the amounts and prosecute the inquiries in the manner most liberal to the deceased tenant for life, and where, from the difficulties occasioned by the delay, evidence was wanting, I should all reasonable presumption in favor of his estate.

ither case, his estate will be allowed, in discharge, sumbrances on the estate paid off by him and not ed for by the will of the original testator; but in neither

neither case will he be allowed anything in respect of the improvements he has made on the settled estates, whether they be lasting improvements or otherwise, nor will he be allowed anything in respect of repairs, except timber in the rough, which may have been employed for that purpose, nor anything in respect of the interest accruing on the incumbrances which it was his duty to keep down.

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In intimating the course I should probably adopt if these accounts and inquiries were prosecuted, and by declaring the Plaintiff, the first tenant in tail, entitled to the *corpus* of the fund produced by the improper felling of the timber in his lifetime, I beg to be understood as not expressing any opinion that he would have been so entitled if he were (if I may be allowed the use of an expression which accurately conveys my meaning) only presumptively tenant in tail in remainder, instead of being, apparently, a tenant in tail in remainder, that is, if he had not been a person who, if he live long enough, must necessarily become entitled to the estates in possession. I by no means assent to the doctrine supposed to be laid down by some of these cases, but as I conceive erroneously so supposed, that if an estate be limited to six persons for life, in succession, with several successive estates tail to their first and other sons in succession, and the first tenant for life commits waste without collusion with any one, the money arising from the sale of the inheritance wasted would belong to the eldest son of the last tenant for life, because he happened to be the only tenant in tail then in existence, and that he could thereby deprive all the future sons of the prior tenants for life, who should be afterwards born, of the inheritance settled on them. If the prior tenant for life could do this, as to a portion, the principle would apply equally to the whole, and he might, provided there was

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no collusion with the tenant in tail *in esse*, give an estate or a valuable part of it to a remote descendant, to the exclusion of many children, who, in the ordinary course of nature, would afterwards come into existence. I do not think that this proposition is intended to be laid down in any of the cases referred to, and I am unwilling to do anything which might lead to the supposition that I considered this to be the law.

I have, I think, in the observations I have already made, disposed of the principal objections urged by the counsel for the executors of Mr. *Egerton Arden Bagot*; but I notice more especially one, from the pointed manner in which it was put, but which, I think, admits of a ready and conclusive answer. It was argued, that the cutting of timber and the winning of minerals by *Egerton Arden Bagot* was either wrongful or not wrongful, in other words, that it was either wrongful or rightful; that if it was wrongful, it was a case for an action at law, and that if it was rightful, the money ought to be settled, and he was entitled to the interest of it. I assent to the proposition that, if it was rightful, the money ought to be settled, but I do not concur that, if not rightful, the Court ought to leave the parties to their remedy at law. In fact, the death of *Egerton Arden Bagot*, and the necessity of administering his estate, entitles any one who seeks to make a claim against his assets to seek the aid of this Court for that purpose, and to compel the executor either to admit assets or to account for his estate accordingly.

Assuming that, in the case of *Legge v. Legge*, which came on to be heard with *Bagot v. Bagot*, and which is brought for the administration of the estate of *Egerton Arden Bagot*, a decree for administration of that estate shall be made, then I am of opinion that the parties to the latter suit, both the Plaintiff and Defendant his father,

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are entitled, when the amount of their claims is settled in *Bagot v. Bagot*, to have a direction for leave to prove the amount due to them against the estate of the testator in the suit of *Legge v. Legge*.

In addition to the above decree which I have intimated, and which affects the estate of the deceased tenant for life, *Egerton Arden Bagot*, I am of opinion that it will be proper, having regard to the facts proved in this case, to direct an inquiry, to ascertain what mines and minerals are now in existence in the settled estate, and what is doing in respect of them, and whether it is for the benefit of the inheritance that any and which of such mines should continue to be worked, and also an account of all profits and moneys derived from the working thereof since the death of *Egerton Arden Bagot*, and by whom the same have been received, or how the same have been applied. And declare that the proceeds that have already arisen therefrom and may hereafter arise from the same ought to be invested as part of the said settled estates, and the dividends arising from the same, when so vested, be paid to the tenant for life for the time being of the estates. And if thought desirable, an inquiry may be taken, in like manner, as to the timber now standing on the estate, adopting for that purpose the form of order in the case of *Tooker v. Annesley* (a), which I have usually followed in such cases.

With respect to costs, I must treat this as a proceeding necessary for the purpose of establishing a debt against the estate of a testator, the costs of which must be added to the debt to be proved. The Defendants, the executors of *Egerton Arden Bagot*, must be declared to be entitled to have their costs of this suit, as between solicitor

(a) 5 Sim. 235.

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solicitor and client, out of the estate of their testator. Their conduct has been perfectly proper and regular in every step they have taken in this suit, the claims in which it was their duty to oppose, and in opposing to give all the information in their power respecting the matters complained of. They were bound to protect the estate of which they are trustees, to the utmost of their power, but in doing so, to conceal nothing, and to submit to act in all respects as the Court might direct. This is the course they have adopted, and they are entitled to a perfect immunity from this Court for having so acted.

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June 8.

Mr. Osborne stated that the compromise suggested had been declined.

The Master of the Rolls said that the decree must be in the terms stated in his judgment. He also stated that the produce of the windfalls (contrary to the popular notion) did not belong to the tenant for life, but must be invested.

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NOTE.—Upon appeal to the Lord Chancellor a compromise was effected.

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May 8, 30.

June 2.

Upon a petition by a mortgagor to tax the bill of the mortgagee's solicitor, after payment, the mortgagee must be served.

A mortgagor seeking to tax the bill of the mortgagee's solicitor, as against the solicitor, stands in the position of the mortgagee himself, and if the mortgagee cannot tax it, neither can the mortgagor; but the mortgagor may tax it as against the mortgagee for the purpose of diminishing the amount of his claim.

### Re BAKER.

THIS was a petition by a mortgagor for taxation of the bill of costs of the mortgagee's solicitor, after payment, under the third-party clause (6 & 7 Vict. c. 73, s. 38). The bill, amounting to 14*l.* 5*s.*, had been delivered on the 30th of January, 1863. It had been paid by

by the mortgagee on the 24th of *February*, and had been paid by the mortgagor to the mortgagee on redeeming the mortgage on the 9th of *March*. The mortgagee had not been served with the petition, and the question was, whether the petition could proceed in his absence.

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**Mr. G. O. Morgan** in support of the petition.

*The Master of the Rolls.*

The mortgagee must be served with the petition. I have repeatedly had occasion to explain the rule, which commonly arises between a mortgagor and mortgagee. The rule is this :—A mortgagor may tax the bill of the mortgagee's solicitor exactly in the same manner as the mortgagee himself might do. But if the mortgagee has bound himself, as regards his solicitor, in such a manner as to prevent his taxing the bill, neither can the mortgagor tax it as against the solicitor. If the mortgagee has paid too much, the mortgagor can only tax it as against the mortgagee, for the purpose of diminishing the amount claimed by him. When a mortgagor seeks to have the bill of costs of the mortgagee's solicitor taxed, it is usual to have the mortgagee present as well as the solicitor. Take this example :—A mortgagee employs a solicitor with reference to the mortgage, and the bill of costs having been delivered, the mortgagee, after examining it, thinks fit to pay it without any pressure, although it is full of improper items. A year afterwards the mortgage is redeemed, and then the mortgagor says, "this bill is very improper, and I am entitled to have it taxed :" he is entitled to have it taxed, but not as against the solicitor ; he is entitled to stand in the shoes of the mortgagee, and if the mortgagee cannot tax the bill as against his solicitor, so neither can the mortgagor, and

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and the taxation must take place as between the mortgagor and mortgagee.

The case is the same with respect to executors. Thus, when a residuary legatee comes against an executor for an account, the executor may say, here are five yearly bills of my solicitor, which I have paid, and I am entitled to be allowed the amount of them. The residuary legatee may have them taxed, but not as against the solicitor, because they have been paid for more than a year and cannot be taxed by his client.

Here, if the mortgagee can tax the bill, it is not necessary to have him here, if the case is put on that alone; but, if not, you must serve him.

May 30.

The executors of the mortgagee having been served, the case was mentioned again. The bill amounted to 14*l.* 5*s.*, of which charges amounting to 5*l.* 10*s.* were complained of as improper.

Mr. G. O. Morgan, in support of the petition, cited *Re Barrow (a)*; *Re Dawson (b)*.

Mr. Selwyn and *Mr. Bates* for the representatives of the mortgagee.

Mr. Baggallay for the solicitor.

June 2.

The Master of the Rolls thought the charges for 5*l.* 10*s.* could not be sustained, but that the violent imputations of fraud had been disproved. He said that he did not intend to send so trifling a matter to the Taxing Master, but that he should direct the repayment of the 5*l.* 10*s.*, and that all the parties should bear their own costs.

(a) 17 *Beav.* 547.

(b) 28 *Beav.* 605.

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YOUNG v. NEILL.

April 23, 24.
May 22.

THE object of this suit was to make the proceeds of the cargo of a vessel called "*The Cathinka*" liable, in the hands of her consignees, for the moneys due to the Plaintiffs, under an agreement of agency and consignment entered into with one of them, by a person of the name of *Crane*, on behalf of the Defendants *Neill* and *Gilbert*. The questions in the cause were both of law and of fact, and arose under the following circumstances :—

In the years 1859 and 1860, the Defendant *Gilbert*, residing at *Shediac*, in the province of *New Brunswick*, carried on an extensive business as a lumberer, that is, in felling and floating pine timber and deals down the stream that leads to *Shediac*, there sawing these pines at his mill into the proper sizes and lengths, and then shipping them to *England* and elsewhere. The Defendant *Neill* also resided at *Shediac*, where he also carried on business as a merchant. In the beginning of the year 1860, the Defendant *Gilbert* was largely indebted to the Defendant *Neill*, and, in order to liquidate this debt, an arrangement was made between them, by which a large consignment of deals was to be made to *London*, of which the principal profit at least, if not the whole, was

If the consignee of a cargo, by agreement with the owner, charter a ship, and expend the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made, and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the shipper of the cargo.

A. B. chartered nine vessels in *England* to fetch *C. D.*'s timber from *Nova Scotia*, under an agreement between them that he, *A. B.*, was to be the consignee. *C. D.*, in breach of the contract, consigned the cargoes to other persons, but *A. B.* arrested the produce of one of them in the hands of the consignee, by means of an injunction :— *Held*, that *A. B.* could maintain a bill against *C. D.* and the consignee to enforce his lien on the produce of that cargo, and that such lien extended to all sums properly expended by him in respect of the nine ships and to all pecuniary losses and liabilities, but not to commission, consignee's profits or damages for breach of the contract.

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to belong to *Neill*. The whole profit was, as *Neill* said, to go in liquidation of his debt. In order to effect the proper arrangement for this purpose, *Joseph Crane* was sent to this country, as the agent of both the Defendants, *Neill* and *Gilbert*. The instructions and authority given to *Crane* by *Gilbert* were by parol, and were only to be gathered from the evidence of both, which was not at variance. The authority given to *Crane* by *Neill* was in writing, and was to this effect:—It authorized *Crane*, when in *England*, to sell, on *Neill's* account, 3,000,000 superficial feet of deals, deliverable at *Shediac* in the ensuing spring, in the customary manner. For all not sold on contract, *Neill* authorized *Crane* to charter vessels to remove them.

When *Crane* arrived in this country, he was unable to sell the deals on contract, and he was obliged, therefore, to proceed on the latter part of his instructions, viz., to charter vessels to remove them. For this purpose he applied to the Plaintiff *Young*, to whom he had a letter of introduction, and with him he entered into the following arrangement:—*Crane* requested the Plaintiff to act as agent and consignee of the Defendants *Gilbert* and *Neill* for 3,000,000 feet of deals, and, on the 14th of *February*, he gave the Plaintiff a written authority to arrange, by sale or contract or charter, for the removal of the deals mentioned. He told the Plaintiff that the average value of the deals was 40s. per 1,000 superficial feet, that the Defendant *Neill* was to be at liberty to draw to the extent of 30s. per 1,000 feet, and that *Gilbert* was to be at liberty to draw on the Plaintiff, against the estimated surplus produce, to the extent of 80*l.* for each ship chartered by the Plaintiff and sent out to *Shediac*, and that the remainder was, subject to the commission and disbursements of the said Plaintiff, to belong to the Defendant *Gilbert*.

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The first question of fact in the cause was, whether the Defendant *Neill* was cognizant of and assented to this arrangement, and the Court, on the evidence, came to that conclusion.

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The Plaintiff *Young* together with the Plaintiff *Lewin*, (who became his partner in *May*, 1860), acted *bonâ fide* on the faith of the arrangement. In *May*, 1860, *Crane* received from the Plaintiffs a written authority enabling *Gilbert* to draw 80*l.* against each vessel to be chartered, and also a written authority to *Neill* to draw on them against the cargoes at the rate of 30*s.* per 1,000 feet.

The Plaintiffs forthwith proceeded to charter the vessels and to make all the necessary arrangements for the purpose of executing their part of the agreement, in the course of which they had to make the usual disbursements, amounting in the whole to a considerable sum, and was said to be about 400*l.*, which the Court, for the purpose of the judgment, assumed to be proper to be allowed as between *Neill*, *Gilbert* and the Plaintiffs. The Plaintiffs chartered nine vessels for this purpose, one was lost, seven arrived at *Shediac* in the month of *May*, 1860, the eighth, the *Cathinka*, whose cargo was the subject of this suit, did not arrive at *Shediac* till *July*, 1860. The first seven vessels were laden before the 23rd of *July*, the bills of lading were sent by *Gilbert* to *Neill*, for the purpose of performing his part of the agreement, and for the purpose of having them sent to the Plaintiffs *Young* and *Lewin*. Instead of doing so, *Neill* sent the bills of lading of these seven vessels and consigned the vessels themselves to Messrs. *Barnes & Son*, of *Bristol*, who accordingly received the cargoes, and, after making the usual deduction, accounted for the proceeds to the Defendant *Neill*; but no part of

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such proceeds had been applied towards repaying to the Plaintiffs the expenses incurred by them for chartering and insuring the seven vessels, or any expense incurred in respect of them.

When the Defendant *Gilbert*, at *Shediac*, found that the Defendant *Neill* had sent the bills of lading to Messrs. *Barnes & Son* and consigned these ships to them, he determined to send the bill of lading of the *Cathinka*, the only remaining vessel, direct to the Plaintiffs, and he accordingly refused to deliver it to the Defendant *Neill*. Thereupon the Defendant *Neill* filed a bill against the Defendant *Gilbert*, in the Supreme Court of the province of *New Brunswick*, praying the delivery up to him of the bill of lading of the *Cathinka*. After some contest and discussion in that suit, and on the 21st August, 1860, an order was made by the Supreme Court of *New Brunswick*, by which the bill of lading was delivered to Mr. *Stephen Wiggins*, of the firm of Messrs. *Wiggins & Son*, of *St. John, New Brunswick*, with directions that they should send it and consign the cargo to their own correspondents in *England*, with directions to them to sell the cargo and to hold the produce thereof subject to the order of the Supreme Court. The Plaintiffs were no parties to this suit in *New Brunswick*, and the only question raised in that suit, as far as appeared from the judgment set forth in the bill, was a question of account between the Defendants *Gilbert* and *Neill*, on the taking of which and on the ascertainment of to which of them the balance was due, the right to the proceeds of the cargo was to depend. In pursuance of this order of the Supreme Court, the bill of lading of the *Cathinka* was sent and the vessel herself consigned to the Defendants Messrs. *Boyson & Tagart*. They sold the cargo, and, after paying themselves all their charges and expenses, there remained

remained in their hands a sum of $615l.$ 10s. 11d., which was subject to the various claims upon it.

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This bill was filed on the 8th *February*, 1861, against *Neill, Gilbert* and Messrs. *Boyson & Tagart*, praying a declaration that the Plaintiffs were entitled to a charge or lien upon the proceeds of the *Cathinka* for what was due to them from *Neill* and *Gilbert*, under the agreement of agency and consignment made through *Crane*, and for an account of damages and also for the accounts and for payment. On the 15th *April*, 1861, an injunction was granted by this Court, to restrain Messrs. *Boyson & Tagart* from paying over to any one the proceeds arising from the sale of the cargo of the *Cathinka*.

The first question was, whether *Neale* knew of and assented to the arrangement entered into, on his behalf, by *Crane*, with the Plaintiffs. The Court, on the evidence, held in the affirmative. The second question was, whether the Defendants Messrs. *Boyson & Tagart* had paid away the $615l.$ 10s. 11d., the net balance of the proceeds of the *Cathinka*, before the injunction had been issued. The Court, upon the facts, held that they had not, and that the $615l.$ 10s. 11d. was still in the hands of Messrs. *Boyson & Tagart*, and that they were liable to produce and make good the same. The third question was one of law, and was whether, upon these facts, the Plaintiffs were entitled to have the produce of the *Cathinka* applied in making good what was due to them from *Neill* in respect of these transactions.

The bill had been taken *pro confesso* as against *Gilbert*.

Mr. *Baggallay* and Mr. *Welford*, for the Plaintiffs,
argued

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such proceeds had been applied towards repaying to the Plaintiffs the expenses incurred by them for chartering and insuring the seven vessels, or any expense incurred in respect of them.

When the Defendant *Gilbert*, at *Shediac*, found that the Defendant *Neill* had sent the bills of lading to Messrs. *Barnes & Son* and consigned these ships to them, he determined to send the bill of lading of the *Cathinka*, the only remaining vessel, direct to the Plaintiffs, and he accordingly refused to deliver it to the Defendant *Neill*. Thereupon the Defendant *Neill* filed a bill against the Defendant *Gilbert*, in the Supreme Court of the province of *New Brunswick*, praying the delivery up to him of the bill of lading of the *Cathinka*. After some contest and discussion in that suit, and on the 21st *August*, 1860, an order was made by the Supreme Court of *New Brunswick*, by which the bill of lading was delivered to Mr. *Stephen Wiggins*, of the firm of Messrs. *Wiggins & Son*, of *St. John, New Brunswick*, with directions that they should send it and consign the cargo to their own correspondents in *England*, with directions to them to sell the cargo and to hold the produce thereof subject to the order of the Supreme Court. The Plaintiffs were no parties to this suit in *New Brunswick*, and the only question raised in that suit, as far as appeared from the judgment set forth in the bill, was a question of account between the Defendants *Gilbert* and *Neill*, on the taking of which and on the ascertainment of to which of them the balance was due, the right to the proceeds of the cargo was to depend. In pursuance of this order of the Supreme Court, the bill of lading of the *Cathinka* was sent and the vessel herself consigned to the Defendants Messrs. *Boyson & Tagart*. They sold the cargo, and, after paying themselves all their charges and expenses, there remained

remained in their hands a sum of 615*l.* 10*s.* 11*d.*, which was subject to the various claims upon it.

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The bill had been taken *pro confesso* as against *Gilbert*.

Mr. *Baggallay* and Mr. *Welford*, for the Plaintiffs,
argued

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argued that a valid and binding contract had been entered into by the Plaintiffs with the Defendants through their agent *Crane*, which had been adopted and acted on by *Neill*. That this contract gave to the Plaintiffs an equitable charge, on the proceeds of the cargo shipped under it, for their outlay made on the faith of it, and also for the expenses and damages incurred by the breach of it, and that such lien affected the moneys in the hands of Messrs. *Boyson*, and extended to the advances, &c. made in respect of all the nine ships.

Mr. *Selwyn* and Mr. *Robinson*, for the Defendant *Neill*, argued that there was no contract binding on him or to which he had assented. That the bill could not be supported, for that its object was for the specific performance of a contract which could never have been and was now incapable of being specifically enforced. That the other object of the bill was to recover damages for the breach of a contract, which was the proper subject for an action at law and not for a suit in equity. But that if the case rested on a claim for a lien, none existed, for there was no contract, no assignment, no possession of the bill of lading or of the proceeds of the cargo, and no custom to authorize it, and that the money itself had been paid over by Messrs. *Boyson & Co.*, under orders of the Court in *New Brunswick*, prior to the injunction. Lastly, that the rights of the Plaintiffs, if any, were limited to their outlay in respect of the *Cathinka*, and did not apply to the other ships.

Burn v. Carvalho (a); Nickolson v. Knowles (b), were cited.

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(a) 4 *Myl. & Cr.* 690.(b) 5 *Mad.* 47.

Mr. J. H. Palmer and Mr. G. Long for Messrs. Boyson & Tagart, in addition, argued that the money in their hands had been parted with by them prior to the granting of the injunction.

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The MASTER of the ROLLS (after stating the above facts and the questions arising in the cause):— May 22.

On the first question of fact, viz., whether the Defendant *Neill* knew of and assented to the arrangement entered into on his behalf by *Crane* with the Plaintiffs, I have arrived at a conclusion favorable to the Plaintiffs. [His Honor carefully examined the evidence and proceeded:] This body of evidence, combined with the probability of the case to which I have already referred, induce me to believe, that the matter was fully and completely explained to the Defendant *Neill* in the end of *May*, 1860, and that he allowed the whole matter to proceed as if he had fully assented to such arrangement. It was his duty, as soon as he resolved to reject the arrangement, to inform the Plaintiff of such his determination, which he never did. But in addition to this, he has obtained all the advantage of the disbursements made by the Plaintiff for the eight ships, which, if they had been chartered by Messrs. *Barnes & Son*, in anticipation of the cargoes being consigned to them, would have been made by Messrs. *Barnes & Son*, and would have been deducted by them from the proceeds, before they were remitted to the Defendant *Neill*. Instead of which, on the 28th *May*, 1860, he writes to *Millidge*, the agent of the Plaintiffs at *New Brunswick*, a letter in which he undertakes to forward to the Plaintiffs the bills of lading of the vessels.

I am of opinion then, on the first question of fact,  
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that the Defendant *Neill* knew of and is bound by the arrangement entered into by *Crane* on his behalf with the Plaintiff.

The second question of fact is, whether the Defendants Messrs. *Boyson & Tagart* had paid away the 615*l.* 10*s.* 1*ld.*, the net balance of the proceeds of the *Cathinka*, before the injunction was issued by this Court. I am of opinion that they had not, and that the 615*l.* 10*s.* 1*ld.* was still in the hands of Messrs. *Boyson & Tagart* when this injunction was granted, and that they are liable to produce and make good the same, when and as this Court shall direct, if it shall give any directions on the subject.

The questions of fact being thus disposed of, the remaining question to be decided is one of law, whether, in the state of circumstances thus detailed, the Plaintiffs are entitled to have the sums arising from the cargo of the *Cathinka* made liable to make good what may be due to them from the Defendant *Neill* in respect of the transaction.

It is argued, on the part of the Defendants, that the Plaintiff must put his case for relief on one or the other of these grounds, all of which fail:—he comes here for the specific performance of a contract, or to obtain damages for a breach of contract entered into with him; or that he comes here claiming a lien on the proceeds of the cargo of the *Cathinka*; and that in no one of these characters can his bill be maintained.

I assent to this mode of putting the case, and I concur with that argument to this extent:—I am of opinion that this is not a bill for the specific performance of a contract, and that it cannot be maintained on that

that ground. The contract entered into, if it ever could have been enforced in equity, is clearly one which cannot now be specifically performed. I am also disposed to accede to the view, that if this bill is to be regarded as merely seeking compensation, in damages, for the breach by the Defendant of an agreement entered into between him and the Plaintiffs, that the proper tribunal to determine that question is at law, and that he cannot properly, by this suit, seek that relief in this Court, but if, independently of the question of loss sustained by breach of the contract, the Plaintiffs are entitled to any lien on the cargo of the *Cathinka*, it may be, that they are entitled to add to such lien the damages really sustained by them, if they can be properly and accurately ascertained. It is on this ground, if at all, that this bill must be sustained by the Plaintiffs. I think that it is clear, that unless the Plaintiffs are entitled to some charge, in respect of something, on the cargo of the *Cathinka*, their case must fail.

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I proceed, therefore, to consider, whether the Plaintiffs are entitled to a charge for anything, and if so, in respect of what, on the proceeds of the cargo of the *Cathinka*, and I think that they are so entitled. I consider the case, in the first instance, as if the *Cathinka* had been the only vessel engaged in the transaction. The case then would stand thus:—The agent of the Defendant *Neill* agrees with the Plaintiffs that they are to charter and send to *New Brunswick* the *Cathinka*, and to expend the money necessary and proper in order to enable her to go thither, in consideration of the vessel and her cargo being consigned to them. *Neill* knew of and assents to this contract, he loads the vessel, takes the benefit of the outlay, and sends the vessel and her cargo to others. I assume that, to some extent, this outlay by the Plaintiffs was proper and necessary, in order

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order to enable the vessel to proceed on her voyage. If so, the outlay must have been made by some one, and if by the consignee of the vessel and cargo, he would clearly have been entitled to a lien on the proceeds for the advance so made.

I am equally of opinion, that where a person, who is not the consignee, has made this advance, and has made it *bona fide* and with the sanction of the person who is the owner of the cargo, and who is thereby enabled to obtain and does obtain the benefit of that advance, by the shipping of the cargo by that vessel, the person who has made such advance, in such circumstances, is entitled to a lien on the proceeds of the cargo, if he can arrest them before they come into the hands of the shipper of the cargo, subject, of course, to all the proper deductions to be made thereout in favour of the consignee of the cargo. If this were not so, there would obviously arise the greatest injustice. The Plaintiffs, by the consent and at the instance of the Defendant *Neill*, through his agent, have contributed money and money's worth towards earning for him the proceeds of this cargo, if not contributed by them it must have been by the consignees of the cargo, if by the consignees then they would have deducted the amount from the proceeds of the sale, and the proceeds to be remitted to the Defendant would have been lessened to that extent. I am of opinion that the Defendant *Neill* cannot take these proceeds and refuse to pay that amount, and that the Plaintiffs are entitled to the aid of this Court, to stop the payment of these proceeds to him until this sum, so disbursed, has been repaid to the Plaintiffs. In all this I assume, of course, that the proceeds belong to and are the property of the Defendant *Neill*; if they are the property of the Defendant *Gilbert* no question arises,

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for then *Neill* has no interest in them, and *Gilbert* does not dispute the claim of the Plaintiffs.

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This is how the matter, in my opinion, would stand if the *Cathinka* had been the only vessel concerned in this transaction. But this is not so, the *Cathinka* is one only of nine vessels included in the same arrangement, entered into in the manner I have stated, between the Plaintiff and the Defendant's agent. The same principle would apply to the proceeds of all the other cargoes, if they were within the control of this Court; but the Court does not sever and apportion the various parts of a contract. If the outlay by the Plaintiffs had been 50*l.* for each vessel, amounting in the whole to 450*l.*, the Court would not marshal the sums against the proceeds of each cargo, and if one cargo had only produced a net balance of 20*l.*, have mulcted the Plaintiffs of the remaining 30*l.*, while the other cargoes had produced sufficient to pay the whole. If I am right in the conclusion of fact to which, as I have already stated, I have come, it was one entire contract binding the Defendant *Neill*, and one in which he has had the benefit of all the outlay made by the Plaintiffs on all the vessels which have contributed to the earning of what he has obtained from the cargoes of the other vessels, the proceeds of which have been severally increased *pro tanto* by the outlay made by the Plaintiffs. The consequence is, that in my opinion the Plaintiffs are entitled to stay any portion of the proceeds of any one of the cargoes which can be identified *in specie*, and that they are entitled to be paid out of such proceeds, as against the Defendant *Neill* and, subject to the claims of consignees and others who have contributed to earn these proceeds, the amount of all the advances and disbursements properly made by them,

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them, the Plaintiffs, under the agreement so entered into with them.

I am also of opinion that they are entitled to tack to that lien, all loss and damage which they have sustained by reason of that contract having been broken by the Defendant *Neill*, and that having a lien on a fund belonging to him, by virtue of which this Court has stopped the payment of it to him, the Plaintiffs are entitled to require that the amount shall not be released until the amount of their claims against the Defendant *Neill*, fairly arising out of the same transaction, have been satisfied. But I must define what I mean by the words "all loss and damage;" by these words I mean all pecuniary loss and damage, and, for this purpose, I think that the provisions of Sir *Hugh Cairns' Act* are not necessary, though they remove any doubt that might otherwise have been entertained on the subject. But, by these words "pecuniary loss or damage," I do not mean to include any profit which the Plaintiffs might or would have made, in case the contract had been fully and *bona fide* performed by the Defendant *Neill*. To give that, is not, in my opinion, within the province of this Court, if I were to give that, it would be, as was fairly argued by the counsel for the Defendants, an attempt to give specific performance of an agreement or damages for the breach of one no longer capable of being performed: if the Plaintiffs required that, they should have gone to law. It is to give effect to the lien, to which, as I have stated, I consider them entitled, that they come into this Court, and that lien is confined to proper advances, to which may be added pecuniary losses, but to which unearned profits cannot be added until they have obtained a judgment at law for them, which they have not done in this case and which they cannot now do.

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The costs must follow the event, as regards the Defendant *Neill*. As regards Messrs. *Boyson & Tagart*, had they simply held the funds as mere stakeholders, I should have given them their costs out of the funds, but they have thought fit to side with the Defendant *Neill*, to argue and support his case and to endeavour to withdraw the fund in their power from the controul of this Court. They, therefore, must take the consequences which usually follow where a trustee or stakeholder adopts the cause of one of his *cestuis que trust*, and the decree against them must be made without costs on either side.

The decree will be to this effect:—Make the injunction perpetual. Order Messrs. *Boyson & Tagart* to pay into Court the sum of 615*l.* 10*s.* 1*ld.*, together with interest after the rate of 4*l.* per cent. per annum from the 5th day of *May*, 1861, within fourteen days after service of the order to be now made. Declare that the Plaintiffs are entitled to a lien on the sum so paid into Court for all sums of money properly paid and disbursed by them for the purpose of enabling the nine ships in question to proceed to *Shediac* in *New Brunswick*, and which have not been repaid to them, and also for all pecuniary losses or liabilities sustained by them, with reference to and connected with the arrangement entered into by and between the Plaintiff and *Crane*, on behalf of the Defendants *Gilbert* and *Neill*. Take an account of all sums of money, &c., (following the words of the declaration). But, in taking such account, no credit is to be given for any commission or profits which would have been realised by the Plaintiffs, in case the said vessels or any of them had been consigned to them. Tax the Plaintiffs' costs of the suit and declare that the Plaintiffs are entitled to add thereto whatever shall be found to be due to them on taking the account

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account aforesaid, and to have the same paid out of the fund in Court. No costs to Defendants *Boyson & Tagart*. Reserve further consideration, liberty to any party to apply.

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## SELLAR v. GRIFFIN.

*April 15, 16.*

A collector of parish rates, appointed by one set of overseers, held accountable to their successors in office for moneys received prior to the appointment of the latter. An account was directed against the collector, not disturbing accounts settled with the pre-decessors, with liberty to surcharge, and the Defendant, who resisted the account, was ordered to pay the costs to the hearing.

**I**N 1858, the overseers of the poor of the parish of *Saint Mary, Battersea*, appointed the Defendant Mr. *Griffin* to be collector of the south western district of the parish, to collect the rates payable under the 18 & 19 Vict. c. 120. By a bond, dated the 25th of March, 1858, the Defendant and two sureties became bound to *Benjamin Edginton* and five others (the overseers) conditioned to be void if (amongst other things) the Defendant should duly account to and pay over all money unto the obligees "or to their successors in office for the time being." The Defendant continued in office down to the 22nd of February, 1862, when he resigned.

This suit was instituted by *Sellar* and five other persons, who were the present overseers of the poor, but all of whom were different persons from those in office in 1858, against *Griffin* alone. The bill prayed an account of the rates made by the overseers for the time being of the parish prior to the appointment of the Plaintiffs as overseers, and received by the Defendant, and that the Defendant might be ordered to pay the amount. It also prayed that the Defendant might deliver over to the Plaintiffs the rate books, &c.

The Defendant said he had been appointed by the former overseers and not by the Plaintiffs, and that he had

had resigned his office before the Plaintiffs had been appointed overseers. He submitted that an agent was only responsible to the person or persons by whom he was appointed. He said that he had duly accounted to the satisfaction of his employers for the time being, and that a large sum was due to him, and he refused to account to the Plaintiffs.

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Mr. Hobhouse and **Mr. Nalder** for the Plaintiffs. The Defendant is accountable to the parish authorities for his receipts while collector, and he has by contract agreed to account to the successors in office. He is also bound to deliver over the books which he holds merely as agent; *Lady Beresford v. Driver* (a). Having resisted the accounts he ought to pay the costs down to and including the hearing; *Collyer v. Dudley* (b); *Anon.* (c).

Mr. Selwyn and **Mr. A. E. Miller** for the Defendant. This bill cannot be maintained; an agent is accountable only to his principal, to whom alone he is responsible; *Lockwood v. Abdy* (d); *Maw v. Pearson* (e); *Robertson v. Armstrong* (f); *Attorney-General v. The Earl of Chesterfield* (g); and the Defendant is the agent of and accountable to the former overseers only. The form of the condition of the bond to account with the "successors" does not enable the Plaintiffs, as successors, to sue upon the bond. Overseers have no succession, as in the case of a corporation; *Co. Litt.* (h); and a bond given to two churchwardens and their successors does not enable the successors in office to sue upon it; *Dyer's Rep.* (i). But the Defendant has already accounted to the persons

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| (a) 14 Beav. 387, and 16 Beav. 134. | (e) 28 Beav. 196. |
| (b) Turn. & R. 421. | (f) Ib. 123. |
| (c) 4 Mad. 273. | (g) 18 Beav. 596. |
| (d) 14 Sim. 437. | (h) 9 a, n. l. |
| | (i) 48 a, pl. 15. |

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by whom he was employed, and cannot be called upon by the Plaintiffs to account again. They also referred to *Farr v. Hollis (a)*; 7 & 8 Vict. c. 101, s. 61; 18 & 19 Vict. c. 120, s. 161; 25 & 26 Vict. c. 102, s. 14.

The Master of the Rolls (b).

The Defendant says that he is not liable to account to the Plaintiffs, on the ground that he is not their agent; and secondly, that he has duly accounted to the persons to whom he was liable to account, and that he is not bound to account over again to the Plaintiffs. I adopt the principle of the cases cited on the part of the Defendant, that an agent, as agent, is only liable to account to his principal; but it is also clear, from those cases, that any person who has got trust or charity property into his own hands is liable to account for it to the persons who are interested in those funds. There is a peculiarity in this case, which it is necessary to refer to. It can be best illustrated by suggesting such a case as this:—Suppose an executor and trustee, entitled to receive property of the testator, employs an agent to get it in, and that, on the death of the executor, the agent has a considerable sum of money in his hands; can anybody contend that the residuary legatees would not be entitled to call on that agent to account, or that they could only get the account through the legal personal representative of the executor, which executor may have died insolvent, so that nobody would take out administration to his estate; and though the executor may have duly accounted to the residuary legatees for everything he received; but his agent may have received large sums of money, in addition, which remain in his hands. Can the agent be allowed to say to the persons entitled “I am not liable to account to you

(a) 9 Barn. & Cr. 315.

(b) *Ex relatione.*

you, because I am not your agent, and all the accounts that have been made to the executor were quite satisfactory to him, and he has said I have properly accounted to him." Assuming even that there had been an account between him and the executor, and even that it had been a settled account, still, although the Court would not disturb the settled account, it would, on proper evidence, give leave, as it always does, to surcharge and falsify, and to shew that the agent had received a sum of money which he had not entered in his account, and although the account might be perfectly good as far as it stood, and you could not quarrel with any of the items in it, yet you might introduce fresh items with perfect correctness.

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I confess I do not think the case turns very much on the nicety of the law respecting overseers. It has been said, that the present overseers cannot now call on the late overseers to account, and that the law makes it impossible for them to do that at this moment, and requires that this should be done within a certain time; but if that be so, and if the Defendant can only account through them, is it an answer to these Plaintiffs for the Defendant to say, that he has duly accounted to the late overseers, and are they not to be at liberty to see if these accounts are correct or not? It would obviously be the right of the residuary legatee, in the case of collusion between an executor and his agent, whom he had appointed to collect money. If the residuary legatee says to the executor, "The agent has received a large sum, has he duly accounted to you for it?" and the executor answers, "Yes, and he has received nothing more," the residuary legatee would be entitled to have all the books of account and papers fully tested by the examination of the agent; and if there appeared to be anything like collusion, he would be entitled to

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make him a party to the suit also, if it appeared that he had trust money in his hands which he had not paid over, then there would be another ground for making him a party to the suit.

Of course, in considering this question of account, I assume, although I am bound to state the evidence would lead to a contrary conclusion, that there is a sum of money in the Defendant's hands, and I am bound to test it by this:—What would the Court do, in case it were established that there was a sum of money due from the Defendant, that is to say, a sum of money received in respect of rates not paid over by him, and now in his hands? And accordingly, in the course of the argument, I asked—whether, supposing the Defendant had 100*l.* in his hands, to whom is he to account for this sum? It appeared, from the answer given, to have been an embarrassing question; the liability to account to somebody was admitted, and it was admitted he could not keep the money in his hands, and that it would be very difficult to say that he was liable to account to the old overseers, because the matter had been settled between them, and they had discharged him. But it was said, that he could not be liable to account to the new overseers, because he was not their agent. I then asked whether he might keep the money? In answer to which I was told that the case suggested was not the case made by the bill, the fact being, that he has duly accounted, and has paid over everything. But how is the Court to tell that? It never allows a decree for account to depend on any statement, whether the balance is due one way or the other. The Defendant says the balance is due to him, it may be so, or there may be a balance against him. My opinion is, that he must account for the rates which he has received during that period of time.

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The Defendant then says, that he has duly accounted, but from the evidence it appears that he did not duly account, but that all he did was, to furnish a mere statement of names and sums of money received, with a banker's receipt for the amount of the sums added up: there was nothing in that to shew that he might not have received more. Though I have no doubt that the Defendant is an honest man, who has paid every penny due from him, and that all this litigation arises out of the squabbles in the parish, yet I must look at the case strictly, and as if there was money to be accounted for by him.

I must therefore direct an account to be taken, without disturbing any settled account between the Defendant and the former overseers, but, at the same time, where there is a settled account, the Plaintiffs must be at liberty to surcharge and falsify, as in every ordinary account, and all just allowances must be made to the Defendant. But, in all the accounts already passed between him and the parish, I shall assume that all the items are correct, and that they have been duly vouched. If there is an account which is not settled, then it must be taken over again in the ordinary way.

The Defendant must also deliver up the books, they are the property of the overseers for the time being, but he must have full and complete access to them, at all reasonable times, for the purpose of making out his accounts.

The Defendant must pay the costs up to the hearing.

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## KNIGHT v. POOLE.

*May 5.*

Bequest to *A.*, and at his death (with certain exceptions) to *B.*, and "at her decease" to be divided amongst four named persons, "or as many of them as may be living":—*Held*, that those only took who survived both *A.* and *B.*

THE testatrix *Ann Lochner*, by her will, made under a power, proceeded as follows:—

"Also I bequeath all the property settled on me at my marriage to my husband *William Conrad Lochner*, which property, at his death (excepting the house No. 5, *West Street, Finsbury Circus*, and 300*l.* in the £3 per Cent. Consols, which I leave to *John Christopher Lochner*, of *Forty Hill*, in the county of *Middlesex*), I leave to my sisters *Mary Fox*, at her decease to be divided amongst the surviving brothers and sisters named in this will, *Elizabeth Poole* or her children, *Jane Bridger*, my brothers *Peter Copeland* and *William Copeland*, to be equally divided amongst them, *or as many of them as may be living*, for their own use, excepting *William Copeland's* share, which must be placed in trust for him to receive the interest of it monthly or quarterly."

The testatrix died in 1846, *Mary Fox*, the second tenant for life, died in 1855, and *William Conrad Lochner*, the first tenant for life, died in 1861.

The testatrix's brother *William Copeland* died in 1860, in the lifetime of *William Conrad Lochner*. The Plaintiff, who was his legal personal representative, by this bill, claimed a share of the property, consisting of two leaseholds, which sold for 800*l.*, a sum of 600*l.* £3 per Cents. and 3,000*l.* cash.

The Defendants demurred.

Mr.

**Mr. Selwyn, Mr. Southgate, Mr. C. C. Barber** and **Mr. Fookes**, in support of the demurrs. The Plaintiff, as representing *William Copeland*, has no interest; for, first, *William Copeland* took for life only, the bequest was intended for his personal enjoyment only; *Banks v. Braithwaite* (*a*). Secondly, the class consisted of those who survived two particular persons and were living at a particular time. The survivorship has reference to the period of distribution, namely, the death of the surviving tenant for life. It is to be "divided," and no division could take place until that period; *Cripps v. Wolcott* (*b*); *Daniell v. Daniell* (*c*); *Hudson v. Bryant* (*d*); *Neathway v. Reed* (*e*).

**The Master of the Rolls:**—I have no doubt on the first point, that *William* took an absolute and not a life interest.

**Mr. Kenyon** and **Mr. Eddis**, in support of the bill. This differs from the ordinary case, for here there are two tenancies for life prior to the gift to the brothers and sisters, and the division is to be "at her decease," namely, at the decease of *Mary Fox*. The survivorship has, therefore, reference to her death, and as *William Copeland* survived her, he became entitled to a share in the property. They cited *Watson v. England* (*f*).

#### ***The Master of the Rolls.***

I am clear that no person took except those who survived the period of division. There is a gift of property to *A.* for life, and at his death (with certain exceptions) to *B.*, and at her decease it is to be divided between  
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- (*a*) 32 L. J. (Ch.) 198.
- (*b*) 4 Madd. 11.
- (*c*) 6 Ves. 297.

- (*d*) 1 Collyer, 681.
- (*e*) 3 De G., M. & G. 18.
- (*f*) 15 Sim. 1.

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the surviving brothers and sisters, who are named. The case of *Cripps v. Wolcott* clearly applies, and only those who survived both *A.* and *B.* could take. The property is to be "divided," and nobody was to take who was not living at the period of division. If I were to adopt the argument of the Plaintiff, the division take place on the death of the husband, though *Mary Fox* might be still living.

I am of opinion that the words in question have relation to the period of division, and that the Plaintiff takes no interest in the property. The demurrs must therefore be allowed.

WELLS v. MAXWELL. (No. 2.)

May 28.

A purchaser is liable to pay interest on his purchase-money from the time when he could prudently take possession; but held, that he could not prudently take possession at the time a good title was shewn, if he had no assurance that a person having a charge on the property would join in the conveyance.

THIS case was put into the paper to be spoken to on the minutes (a).

The contract, dated the 26th of *May*, 1862, was for the sale of some bare land producing no rent, and the 6th clause provided as follows:—

"That if, from any cause whatever, not occasioned or arising from the default of the said *William Wells*, his heirs or assigns, the said purchase shall not be completed on the said 1st day of *July*, the said *William Maxwell* shall pay interest, after the rate of 4*l. per cent. per annum*, on the said sum of 2,000*l.*, from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession of the said land and the rents and profits (if any) from the said 1st of *July* until the day of the completion of the purchase."

The

(a) *Sce ante*, p. 408.

The contract was not completed on the 1st of *July*, 1862, the delay having arisen from the non-compliance by the vendor with two requisitions, the first related to the removal from the register of a *lis pendens* affecting the property, but which had been satisfied, and the second to the release of a drainage charge on it, which had not been effected until *February*, 1863. The bill was filed in *January*, 1863, and the Defendant insisted that he had put an end to the purchase by notice; but the Court directed the specific performance of the contract.

Mr. *Selwyn* and Mr. *Jessel*, for the vendor, now argued, that the Defendant was bound to pay interest on the purchase-money from the 1st of *July*, 1862, under the sixth condition, there having been no wilful default attributable to the vendor. That such a condition had been held to be operative where the delay was the result of accident and could not have been guarded against by the vendor; *Sherwin v. Shakespeare* (*a*).

Secondly, that, independently of the special contract, the general rule was applicable, which was, that interest must be paid from the time a good title was shewn, which, in this case, was on the 25th of *August*, or from the time at which the purchaser could safely take possession; and that, considering the nature of the requisitions, this was on the 1st of *July*, 1862; *Dart's Vendors* (*b*); *Sugden's Vendors* (*c*), (*d*).

Mr.

(*a*) 17 *Beav.* 267, and 5 *De G., M. & G.* 517.

(*b*) *Page* 407 (3rd edit.)

(*c*) *Page* 630 (14th edit.)

(*d*) See *Esdaile v. Stephenson*, 1 *Sim. & St.* 122; *De Visme v. De Visme*, 1 *Mac. & G.* 336; *Wallis*

v. Sarel, 5 *De G. & Sm.* 429; *Litchfield v. Brown*, 23 *L. J.* (Ch.) 176; *Robertson v. Skelton*, 12 *Beav.* 363; *Coupe v. Backett*, 13 *Beav.* 421; *Sherwin v. Shakespeare*, 18 *Beav.* 527, and 5 *De G., M. & G.* 517; *Car-*

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Mr. Baggallay and Mr. Batten were not called on.

The MASTER of the ROLLS.

I am of opinion that the vendor is not entitled to interest from the time he claims it.

It is said that interest is payable from the time when the purchaser could have prudently taken possession, that he could take possession when a good title was shewn, and that the joining of a mortgagee is a question of conveyance and not of title. All that is true, but in my opinion it mixes several things together which cannot be properly united. I admit that the rule is, that interest is to be given from the time when the purchaser could prudently take possession, but I do not think a purchaser could prudently take possession on the title being perfectly well shewn, if it appeared that the property was mortgaged to its full amount, and that there was no assurance that the mortgagee would join the conveyance, and it was not known whether the vendor could get him to join. It is true that this is a matter of conveyance, but the purchaser does not know that you can get the mortgagee's consent to it. This question occurs:—Is a condition of this sort to be so treated, that if a good title be not shewn on the exact day stipulated, then, though there is but a simple matter in dispute, the whole condition is at an end, and the purchaser may be guilty of any species of delay and to loiter over the matter as much as he pleases, and yet that he is not to be subject to any of the consequences arising from it? I am of opinion that is not so. But, on the other hand, the vendor cannot derive any benefit from

rodus v. Sharp, 20 Beav. 56; (*Ch.*) 8; *Tewart v. Lawton*, 3 *Vickers v. Hand*, 26 Beav. 630; *Sm. & Giff.* 307; *Burnerman v. Denning v. Henderson*, 17 Law J. *Clarke*, 3 Drew. 632.

from his own carelessness. I think that there was a considerable amount of delay in this case on the part of the vendor, that he did not shew, as he might, various things, and that he cannot excuse himself by saying that the official liquidator was out of the country at the time. Having regard to all these matters, I think that he was negligent in this respect, and although I do not think that it deprived him of the benefit of his contract, still I think he ought not to be allowed interest from the 1st of *July* under it; but, if not from that time, it is difficult to say from what other time he ought to be allowed interest.

I am of opinion that the purchaser could not prudently have taken possession, for he could not make certain of having his conveyance, and the decree must stand as it was, without giving any interest to the vendor.

NOTE.—On the appeal, the Lords Justices gave the Plaintiff interest from the 9th of *April*, 1863, the date of the decree.

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May 8.

An infant being entitled to one-ninth of a real estate, and it being for her benefit, the Court, instead of directing a partition, declared the costs a charge on the infant's share, and ordered a sale of the whole estate.

DAVIS v. TURVEY.

THIS was a partition suit, and the parties, who were entitled in ninths, were desirous, in order to save expense, that a sale should take place instead of a partition, but one of the parties, *Florence Matilda Scholar*, was an infant and could not consent.

Mr. *Everitt*, for the Plaintiff, asked that the costs of the suit might be declared a charge on the property. See *Cox v. Cox* (*a*) ; and that thereupon the estate might be sold and the produce divided. He said that this course had been pursued by Vice-Chancellor *Wood* in *Thackeray v. Parker* (*b*). But see *Griffies v. Griffies* (*c*) ; *Calvert v. Godfrey* (*d*) ; *Johnson v. Baber* (*e*).

Mr. *Freeling*, for the Defendants, concurred.

The MASTER of the ROLLS.

I think I can do it, considering the smallness of the property and the number of the shares.

(*a*) 3 *Kay & J.* 554.
 (*b*) 1 *New Rep.* 567.
 (*c*) 8 *L. T.* 758.

(*d*) 6 *Beav.* 97.
 (*e*) 8 *Beav.* 233.

ABSTRACT OF DECREE.

"The Plaintiffs and Defendants (other than the Defendant *Florence Matilda Scholar*) not desiring a partition of their shares, but that the same shall be sold as hereinafter directed : His Honor doth declare, that it is for the benefit of the infant Defendant, *Florence Matilda Scholar*, and of the other parties interested, that the entirety of the said hereditaments and premises, including the one-ninth of the said infant therein, should be sold. And it is ordered, that the said hereditaments and premises be sold accordingly," &c.

"And his Honor doth declare, that the costs of the infant Defendant *Florence Matilda Scholar* of this suit, up to the hearing, in respect of her one-ninth share of the said hereditaments and premises, are properly chargeable upon her share."—*Reg. Lib.* 1863, *A.*, fol. 1112.

1863.

May 29.

THIS was a bill by vendors against the purchaser, for the specific performance of a contract, under the following circumstances:—

On the 8th of *March*, 1862, the Defendant, Mr. *Oakes*, agreed, by private contract, after an attempt to sell by public auction, to purchase some landed property for one undivided sum of 16,650*l.* This property was held under three distinct titles, and belonged to three sets of persons and the purchase-money was for one gross sum for the whole. The first portion belonged to Mrs. *Rede* in fee; the second was vested in the trustees of her marriage settlement, who had a power of sale; and the third, which had originally belonged to the four daughters of *Robert Rede Rede*, as tenants in common, was now vested in four sets of trustees of these settlements, who had powers to sell with the consent of the four daughters and their husbands, and to give good receipts for the purchase-money.

Properties held by several trustees under several trusts and for different persons, were sold together, in one lot, for one undivided sum and with special conditions, as to part, limiting the title. *Held*, that the purchaser could not resist the specific performance of the contract, on the ground of the mode in which the trust property had been sold. *Held*, also, that the Court, if necessary, would apportion the purchase-money.

It was stipulated, by the conditions of sale, that the title to Mrs. *Rede's* portion of the property should commence at different periods for different parts, varying from 1803 to 1845.

This bill was filed by Mrs. *Rede*, the trustees of her settlement, and the four daughters of *Robert Rede Rede* and the trustees of their respective settlements (twenty-two persons in all) against Mr. *Oakes*, praying the specific performance of the contract.

After

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After the sale, the Plaintiffs had executed an agreement, by which they apportioned the purchase-money and agreed that 140*l.* should be considered the value of Mrs. *Rede's* portion of the property; 352*l.* the value of the portion subject to her marriage settlement; and that the remainder, being 16,158*l.*, should be considered as the value of the part of the property belonging to the four daughters and the trustees of their settlements.

The Defendant objected to complete his contract, on the ground that trust property, held under different titles, ought to have been sold separately, and not together for one undivided sum, and that the sale was, therefore, invalid.

Mr. *Baggallay* and Mr. *F. J. Turner*, for the Plaintiffs, argued, that a valid contract had been entered into, which the Defendant was bound to perform. That the case was governed by the decision in *Clarke v. Seymour* (*a*), and that the purchase-money might be apportioned either by agreement or by a reference, as was done in that case. That the Defendant would obtain a good title by a conveyance executed by all the Plaintiffs, and that if the *cestuis que trust* complained, their remedy would not extend to the estate, but would be limited to the purchase-money and the personal liability of the trustees.

Mr. *Selwyn* and Mr. *J. Humphrey*, for the Defendants. When distinct trustees join in selling three estates, mixed up together, in one lot and at one price, it is plain that they do not, as they ought, exercise any discretion as to the price accepted for their own portion of

(*a*) 7 *Simons*, 67.

of the whole. Infants and unborn persons may hereafter become interested in the produce of the sale, and such a contract involves a breach of trust, in which case this Court will never interfere: *Mortlock v. Buller* (*a*); *Thompson v. Blackstone* (*b*).

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It is the duty of each set of trustees to sell their own trust property by itself, at the best price they can obtain for it, and the very fact that, in this case, the 16,158*l.* was afterwards apportioned, proves that there was no previous determination as to the amount they would each take. If a field, a house, and a mine, held by three distinct sets of trustees, and for three different sets of persons, were sold together, leaving it to mere hazard how the purchase-money was to be divided, it could not be supported.

There was no authority to these trustees to sell the property held by them in trust combined with other property, and with a power to partition the purchase-money; and such a sale is especially objectionable where the properties are different in quality and different in title. Here there was a stipulation as to part that the purchaser should take a seventeen years' title. The law imposes severe penalties on those who mix their own property with that of others; thus if *A.* mixes his corn with *B.*'s, so that it cannot be severed, the whole mass belongs to *B.* (*c*)

Secondly. The difficulty is increased by the special condition as to title; part is sold with a sixty years' title and part with only thirteen. On what principle
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(*a*) 10 *Ves.* 292.

(*b*) 6 *Beav.* 470.

(*c*) *Ward v. Ayre*, 2 *Bulst.*

323; *Fellows v. Mitchell*, 1 *Peere H'ms.* 83, and 2 *Vernon*, 516.

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can the purchase-money of property so situated be apportioned? Such a contract as the present is not binding on the *cestuis que trust* under the marriage settlements of the daughters.

*The Master of the Rolls.*

I think there is nothing in these objections. If two persons are together the owners of an estate, but in such a manner that it is very difficult to distinguish what the share of each is, they may join together and sell the property, and make a perfectly good title to the purchaser, who cannot complain of the way in which the vendors afterwards divide the purchase money. All that the purchaser has to consider is, whether he gets a perfectly good title to the land which he has contracted to buy. I will first treat the case as if there had been no special conditions of sale, and a contract had been entered into by two persons to sell the property to a purchaser. Suppose the vendors were tenants in fee simple of the lands, the boundaries of which were so inextricably mixed up and confused that nobody could tell where they really were, and that if unsold a suit would become necessary for settling the boundaries. In that case, those two persons might undoubtedly join in a sale of the whole to *A. B.*, who could not, after he had got his conveyance, complain of the manner in which the sellers had divided the purchase-money. If they went to law about the manner in which it should be divided, he, having got a complete title by the conveyance to him from each of his share, could not be mixed up or concerned in their dispute. Now, if that be good in the case of two vendors, of course it is good in that of any greater number, and if a person who enters into such a contract for the purchase of land gets a good title, he, having got a conveyance from all the claimants, is safe, and must be satisfied.

Then

Then suppose, instead of there being two owners in fee simple, that part of the property is vested in trustees for other people. If the trustees have a power to sell, and join with the other owners in fee simple in selling the whole property, I am of opinion, even if the trustees should consent to take less than their proper share of the purchase-money, and might therefore be liable to the *cestuis que trust* for a breach of trust, still that the purchaser would not be affected by it, he having obtained a conveyance from both sets of owners. The division of the purchase-money could not affect him, unless he had notice beforehand, that there was a corrupt contract between the vendors, by which the *cestuis que trust* were to be defrauded of a portion of their property, in which case a different question would arise. But no such case is suggested in the case before me. If any such case exists, it will be open to the purchaser to take that or any other objection before me in Chambers. But if no such case exists, then the circumstance that the purchase-money is to be apportioned does not constitute an objection. If the parties cannot agree on the division of the purchase-money, then, I apprehend, after a decree for specific performance, it is the duty of the Court to determine in what manner the purchase-money is to be divided, and when this Court has determined how it is to be divided, the *cestuis que trust* are bound by that decision. After this no question of breach of trust can arise in which the purchaser can in any degree be implicated. In this case, I am of opinion that the Court has full power to determine the question of the division of the purchase-money, and to make a reference, similar to that made in *Clark v. Seymour* (a), that is: to inquire how and in what proportion the purchase-money ought to be divided.

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Then

(a) 7 Simons, 67.

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Then comes the question, how this case is affected by the particular conditions of sale. It appears to me that the purchaser has assented to certain conditions, by which he gets a sixty years' title for part of the property, and only seventeen years' for another part of the property. I do not enter into the question whether the Defendant is entitled to have these portions of the property distinguished, that is not the question now before me; it would be singular if he were not, for his title would not be clearly made out, if the vendors did not specify the parcels to which each title belongs. That, however, is a matter to be settled in Chambers. But the question now is, whether, having entered into this species of contract, and having agreed to take a seventeen years' title for a part of the property instead of a sixty years' title, the Defendant can afterwards raise a question as to the division of the purchase-money. I am of opinion that he cannot, and that the Court will, if necessary, determine how the purchase-money is to be apportioned.

I am of opinion, therefore, on this point also, that no objection can be made to the relief asked. I do not intend to make any special direction, but I propose to make a decree for specific performance of the contract in the usual terms, and direct the usual reference as to title, and an inquiry when the title was first shewn. And if it shall appear that a good title can be made to the property, then let there be an inquiry, among whom and in what shares the purchase-money is to be apportioned and divided, and reserve further consideration and costs.

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1863.

—~*Re THE FIRE ANNIHILATOR COMPANY.**April 18.  
May 2, 7.*

**T**HIS company was registered in 1856, under the 19 & 20 Vict. c. 47.

In 1858, the company passed a special resolution requiring the company to be wound-up voluntarily, and the secretary was appointed official liquidator. These proceedings were, however, tardy and unsatisfactory, and the winding-up had not yet been completed. The property had not been wholly disposed of, calls had been made, further liabilities had been incurred, the accounts had not been rendered from year to year, and general meetings had not been called to consider them, as required by the 19 & 20 Vict. c. 47, s. 104, (12).

Where the proceedings in a voluntary winding up, under the Act of 1856, were dilatory and unsatisfactory, and had not come to a conclusion at the end of five years, the Court, upon the petition of a shareholder, directed a winding up under the Court.

Under these circumstances, a petition was presented by a shareholder for the compulsory winding-up of the company.

**Mr. Baggallay** and **Mr. Roxburgh**, in support of the petition.

**Mr. Wickens, contra**, for the official liquidator. The Court has no jurisdiction to interfere pending a voluntary winding-up, and a shareholder has no right to apply for a compulsory winding-up after the company has duly resolved that it shall be wound-up voluntarily. The 19 & 20 Vict. c. 47, s. 105, says, that a voluntary winding-up "shall not prejudice the right of any *creditor* of such company to institute proceedings for the purpose of having the same wound-up by the Court." This

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 COMPANY.

exception, in favor of creditors, shews that contributories have no such right. The 20 & 21 Vict. c. 14, s. 19, is merely supplemental and only refers to proceedings by creditors, and not to those of contributories. He also referred to the 19 & 20 Vict. c. 47, s. 67. He defended the proceedings of the liquidator, and argued that no good could result to anyone from a compulsory winding-up.

The Master of the Rolls.

I do not at present see anything which takes away the power of a contributory to have the company effectually wound-up by the Court. The petition had better stand over, in order to enable the Petitioner to examine the accounts and for the official liquidator to furnish further information as to the proceedings.

The accounts and information furnished proved unsatisfactory and the application was renewed.

Mr. *Baggallay* and Mr. *Roxburgh* in support of the petition.

Mr. *Wickens, contrā.*

The Master of the Rolls held, that the 105th section of the act 1856 did not exclude the right of a contributory to present a petition for winding-up a company compulsorily, after a resolution to wind-up voluntarily. He said that if the contrary were held, then the effect would be, that an official liquidator might go on for years, and that there would be no end of the proceedings in the winding-up. That, before the winding-up acts, every

every partner had a right to have the partnership accounts taken in this Court, and that the statutes were only intended to remove the preliminary difficulties in obtaining a decree where the partners were numerous, and were never intended to deprive partners of their right to have the partnership wound-up.

That, considering the unsatisfactory explanations offered, the usual compulsory order must be made, under which the official liquidator must account.

The registrar objected to draw up the order, unless petition were intituled in the act of 1862 (25 & 26 Vict. c. 89).

Mr. Roxburgh applied that the order might be drawn up without amending the petition. He relied on the 25 & 26 Vict. c. 89, s. 207, which enacts, that "where previously to the commencement of this act," &c., "a resolution has been passed for winding-up a company voluntarily, such company shall be wound-up, in the same manner and with the same incidents, as if this act were not passed, and, for the purposes of such winding-up, such repealed acts or act shall be deemed to remain in full force." He cited *In re The West Silver Bank Mining Company* (a).

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May 7.

The Master of the Rolls said the order might be drawn up under the acts of 1856 and 1858.

(a) *Ante, page 226.*

1863.

Feb. 17, 18.

The Defendant was one of two trustees for sale of an estate, the produce of which was divisible amongst persons *sui juris*. He refused to concur in a sale agreed upon by his *cestuis que trust*, until he had been furnished with deeds, &c. relating to another and an independent trust, and to which the Court held he was not entitled. He also refused to retire from the trusts to facilitate the sale. Upon a bill by the other trustees and the persons beneficially interested, he was removed from the trusts and ordered to pay the costs of the suit.

BY an indenture dated in 1839, and made between Mr. and Mrs. *Bateman* and *Palairet* and *Carew*, after reciting that there were eight children of Mr. and Mrs. *Bateman* (specifying them), certain real estates were conveyed to *Palairet* and *Carew*, upon trust, with the consent of Mrs. *Bateman*, during her life, and afterwards of their own authority, to sell and hold the produce on certain trusts for Mr. and Mrs. *Bateman*, and after their deaths in trust for their children.

Down to 1856 nothing had been done as to effecting a sale, but in that year, *Palairet* and the parties beneficially interested, after a valuation, entered into a verbal agreement for the sale of the property for 1,980*l.*, subject to the approval of *Carew*. They applied to *Carew* for his concurrence, who, fearing to be involved in some future liability, placed the matter in the hands of a solicitor, who stated that Mr. *Carew* was "satisfied with the valuation, and content that the estates should be sold in accordance therewith." A formal contract was prepared, but Mr. *Carew* then required copies of deeds, and information relating to trusts unconnected with the trusts of the deed of 1839, and said, "until I see my way clear, I cannot enter into any contract." An angry correspondence ensued. Mr. *Carew* refused to concur in the sale until the documents had been produced.

Mrs. *Bateman* died in 1857, and the matter was renewed, but without any result. Mr. *Bateman* died in 1859, and the matter of the sale was again renewed, an irritating

irritating correspondence went on; *Carew* still refused his concurrence therein down to 1861, when the parties beneficially interested signed a written contract for the sale of the property. *Carew* still held out and refused to concur in it, and the beneficiaries, who were all *sui juris*, requested him to resign his trusteeship, and wrote to him as follows:—“27th Nov., 1861. As your refusal to concur in the contract we have entered into with Mr. *Stone* for the sale of *Skybborwen*, &c., must involve us in litigation and loss, and as the motive you allege for such refusal is:—lest you should, by acting, endanger yourself and your family, and incur responsibilities which, as you truly observe, no one would covet, and few would incur. We, the undersigned, being all the beneficiaries for whom you are trustee, and all *sui juris*, are desirous of relieving you of your trust, and to nominate another person in your place, who will act in concurrence with your co-trustee, and we are willing to execute to you a release and indemnity on your resigning, a step which we earnestly hope you will not now decline to take.—*Jane Palairet; J. G. Palairet* for myself, and as agent for my son *Gwalter; Robert Bateman; Sarah Kelson; Reginald Bateman; Thomas Bateman.*”

Mr. *Carew* still refused to do this without having all the documents and information he had previously required furnished him, and to which he still claimed to be entitled, in order to be exonerated from all responsibility. This, he said, “would not be the case, if he should decline to commit a breach of trust, but resign in order to enable his successor to do so” (*a*).

Mr. *Carew* still refusing to concur in the sale, this suit was instituted in *March*, 1862, by Mr. *Palairet* (his

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*Palairet v. Carew.*

(a) See *Webster v. Le Hunt*, 1860, and *Lord Chancellor, July, Vice-Chancellor Kindersley, June, 1861.*

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(his co-trustee), and the parties beneficially interested against Mr. Carew alone, and the bill prayed, that Mr. Carew might be removed from being a trustee, that the sale, if proper, might be carried into execution, and that Mr. Carew might concur therein and pay the costs of the suit.

**Mr. Baggallay and Mr. Cracknell for the Plaintiff.**

**Mr. Selwyn and Mr. Dickinson, for the Defendant.**

*Uvedale v. Ettrick (a); Jones v. Lewis (b); Hampshire v. Bradley (c); Price v. Loaden (d)* were cited.

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### *The Master of the Rolls.*

**Feb. 18.**

I am sorry I cannot find any justification for the course of conduct which the Defendant has thought it his duty to pursue. In the year 1839, he undertook to perform certain trusts—[His Honor stated them]—and these appear to have been very plain and simple. There is a trust to sell the property, and to invest the proceeds for the benefit of the persons mentioned. Nothing was done in the matter of the trusts until 1857. In that year, Mrs. Bateman being still alive, it was thought that an eligible sale could be effected, and thereupon the parties applied to the Defendant to consent to such sale. The course which he adopted, in the first instance, was as fit and proper as could be. He proposed to appoint a solicitor, on his behalf, to ascertain whether it was a proper sale, and to satisfy himself with respect to the valuation and the concurrence of the other parties beneficially interested. The Defendant got alarmed apparently

(a) 2 Chanc. Cas. 130.  
 (b) 1 Cox, 199.

(c) 2 Coll. 34.  
 (d) 21 Beav. 508.

rently from the circumstance of the loss which Mr. *Bateman* had sustained by not having performed certain trusts relating to another matter. He thought that he could not safely act without examination, not into the trusts of the deed of 1839, but into another trust, which related to the marriage settlement of Mr. and Mrs. *Bateman*, which was recited in the deed of 1839, and to property in *Ireland* and the *West Indies*. But the trusts of the marriage settlement were perfectly distinct from those of the deed of 1839, and the Defendant, in my opinion, was not justified in requiring to have a full explanation of all the trusts and of all the deeds, documents and papers relating to the different descriptions of property and premises, for the purpose of determining what were the trusts which he had accepted, or which had devolved upon him, under the deed of 1839, before he entered into this contract. His trusts, under that deed, were simply to sell and stand possessed of the proceeds for the benefit of the parties named. In no possible way can I (after anxiously endeavouring to find some excuse for his conduct) find any reason why he should not have acceded to the request of the parties. The Defendant declined to do so during the life of Mrs. *Bateman*; she died in *January*, 1857, and thereupon the matter was renewed and the negotiations were continued during the life of Mr. *Bateman*, and he died in 1859. It was renewed again, the Defendant still resisted, and matters so continued down to the year 1861, when the parties concerned in the matter applied to him to give up the trust and have some other person appointed. He declined to do this without seeing all the documents and papers relating to the other trusts, upon the ground, that if a trustee surrendered up a trust to a person who committed a breach of trust, he might be made liable for the consequences which might arise from the misconduct of the new trustee. That, no doubt, is correct

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to

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—  
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to this extent :—If a trustee be called upon to commit a breach of trust and refuses, and his *cestuis que trust* say, “There is *A. B.* who will; will you resign and surrender your trust to him?” and the old trustee accede to that proposal, and transfers the property to the new trustee, for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the Court. But here the trustee is merely asked to perform the trust which he has undertaken, and which he refuses to do, and then he is asked to resign, in order that some one else may perform the trust, which he has undertaken to perform and which he refuses to do, and thereupon, he still refuses either to perform the trust himself or to allow any other person to do it.

It is suggested, that the proper course would have been to have called upon Mr. Carew to sell the property himself in such a way as he might think proper; but that is not the usual course, nor was it necessary to do so, nor, indeed, did he require that this should be done. The usual course, in such cases, is, for *cestuis que trust*, who are the persons most interested in the matter and who have the strongest motive for obtaining the highest possible price, to enter into a conditional contract of sale, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed to be given for it is the value of the property, ought to sanction a sale which is beneficial for the persons for whom he is trustee. That is all the Defendant was required to do, and all that he ought to have done; but he has continually resisted this down to the time of filing the bill, and has insisted upon mixing up this trust with two other trusts which had nothing at all to do with it.

It has been argued, that, since the institution of the suit,

suit, the Plaintiffs have furnished the Defendant with copies of the deeds which he required, and that they might have furnished them before. It is unnecessary to enter into this; for I am of opinion that he had no right to ask for them, for they were in no way connected with the trusts he had to perform. The parties might have expected that the trustee would go on making further requisitions, and it may well have been, that they expected, after those copies had been furnished, that some other demand would be made by Mr. Carew, which he would be as little justified in making, and which they would have been equally justified in refusing. It is not necessary for *cestuis que trust* to yield to an unreasonable demand, but if he does so, he does not thereby lose any of his rights. It is enough to say, that it is the duty of the trustee to perform the trust which he has undertaken, and that if he compels his *cestuis que trust* to come to this Court, to compel him to do so, he must take the consequences of not having performed his duty. Here it is obvious that the Plaintiffs have shewn very considerable forbearance, and have tried to avoid coming to this Court.

I have endeavoured to arrive at a conclusion which might relieve me from the necessity of making the Defendant bear the costs of the suit, but I am of opinion that the Defendant has rendered this suit necessary, and that he must pay the costs of it up to and including the hearing.

I will appoint a new trustee and direct a conveyance, and then stay all further proceedings against him.

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1863.



*Feb. 19.  
Mar. 6.*

**Hoops of whalebone, cane and other substances, suspended from the waist and forming a petticoat, had long since been used by ladies.**  
**The Plaintiffs took out a patent for using, for the same purpose, hoops made of steel watch springs.** *Held,* that this was not an invention which could properly be made the subject of a patent.

### THOMPSON v. JAMES.

THE Plaintiffs were assignees of an English patent granted on the 22nd of *July*, 1856, of a French invention of a flexible petticoat or *sous-juppe*, now commonly called "crinoline." It consisted of a number of circles or hoops made of steel watch spring; these were attached to pieces of tape or riband, and suspended by them from a band fastened round the waist.

This bill was filed against the Defendants to restrain the infringement of the patent, and to recover profits and damages. The validity of the patent was contested by the Defendants, on the ground of want of novelty, that the very article had been imported from *France* and in use prior to the date of the patent, that the invention could not be made the subject of a patent. The nature of the latter objection is clearly set forth in the following paragraphs of an affidavit filed on behalf of the Defendants:—

"I say that the principle of making a skeleton skirt composed of hoops or circles suspended by tapes was not new at the date of the Plaintiffs' letters patent, the same having been practised, with circles of wadding and of whalebone and of cane and of linen or cotton cord over wire. And I say, that so long ago as in the last century, ladies' hoops were made of circles suspended or fastened together by tapes, thus forming a skeleton skirt. An instance of this description of skirt may be seen in the well-known picture by *Hogarth*, forming the seventh in the series illustrative of *Industry and Idleness*."

"The

"The properties of steel as a flexible substance were perfectly well known before the date of the said letters patent, and steel had been applied to ladies' caps, to the sleeves of ladies' gowns, to ladies' stays, and in various other ways in which distension with flexibility were desired to be attained."

"I am advised and believe, for the reasons above stated, that the said letters patent are invalid, not only because of the prior use, in *England*, of the actual article patented, but also because steel had been previously employed for purposes so analogous to the purposes for which the patentee applied steel, that the principle of a skeleton skirt composed of flexible circles suspended by tapes being old, the mere application of steel for the hoops or circles, in substitution for cane or whalebone, would not constitute an invention for which a patent could, by law, be sustained."

A motion was now made for an injunction.

**Mr. Baggallay and Mr. Locock Webb** for the Plaintiffs.

**Mr. Selwyn and Mr. Fookes** for the Defendants.

#### *The Master of the Rolls.*

As at present advised, I must say I do not think that this is or that it can be made the subject of a patent. I do not conclude the Plaintiffs by what I am going to say now, as they will have an opportunity of trying it in another place. The Plaintiffs do not claim the number of hoops or the fact of using hoops for this purpose, and it is admitted that if they were made of whalebone or cane or any other substance except watch-spring steel, it would be no violation of the Plaintiffs' patent. The claim seems to be limited exclusively to the use of steel springs in combination with suspending tapes or bands,

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bands, making this form of petticoat. If the articles manufactured by the Defendants had been made of whalebone, and in exactly the same form and suspended in precisely the same manner as the Plaintiffs, it would be no violation of their patent. So if they were made with iron hoops or steel hoops, providing they were not springs, as far as it appears, it would be no violation of the Plaintiffs' patent. The patent seems to be a mere substituting of steel springs in the place where other elastic materials were used before.

That hoops were worn in this country by our ancestors, as, by our grandmothers and great grandmothers, is, I apprehend, a fact of which one has knowledge historically, which is not necessary to have established by evidence. But the writings of authors of that time might be referred to as proving their use. I have some lines in my head from *Alexander Pope's "Rape of the Lock (a),"* which would go a great way to shew that instruments of this sort were used for dresses at that time. Well then if the Plaintiffs' claim is simply to use steel springs in a position where formerly whalebone was used, that does not appear to me to be the subject of a patent, there is no invention and nothing that can properly be called an invention in that, and nothing which can properly form the subject of a patent.

Without referring to those cases, of which there are so many, which have been so lately before me and commented

(a) Probably the Master of the Rolls referred to the following lines in Canto II.—

"To fifty chosen sylphs of special note  
 We trust th' important charge, the petticoat.  
 Oft have we known that seven-fold fence to fail,  
 Though stiff with hoops, and arined with ribs of whale,  
 Form a strong line about the silver bound,  
 And guard the wide circumference around."

mented upon in *Spencer v. Jack* (*a*) and several other cases, I may state, that, to constitute the subject of a patent there must be some real novelty in the invention, either by a new combination of old existing materials, or else by the discovery of something that did not exist before. I express no opinion whether this could have been registered under the act for the registration of useful designs (*b*); but as the subject of a patent, it does appear to me that it cannot be entertained.

I think it desirable to express my opinion clearly upon the subject, because these patent cases lead to great expense, and it is much better for the parties to know at once what my view of the case is. Still I think that the Plaintiffs ought not at present to be precluded by my opinion. I shall make no order upon this motion, but will not deprive the Plaintiffs of an opportunity (subject to what I may hear from the Defendants) of trying the matter at law.

The Plaintiffs now asked for an issue to try the validity of the patent. The 25 & 26 Vict. c. 42 was referred to. But after some argument,

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*The Master of the Rolls* said, that he would find everything in favor of the Plaintiffs, which could be found for them by a jury if an issue were directed, viz., that the substitution was new and useful, and that the specification was sufficient; but that still he must determine, as a Judge, that the substitution of steel wire for whalebone was not the subject of a patent. He refused the application.

(*a*) *Master of the Rolls*, 5 June, 1862.      (*b*) 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 75; and see ante, p. 200.

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## W— v. B—.

## B— v. W—.

*Mar. 13, 17.*

A daughter joined her father in covenanting to surrender a copyhold, by way of mortgage, to *A. B.* for a sum of money lent by him to the father. Part of the consideration was the permission of the father to allow *A. B.* to continue his visits to the daughter, whom he was seducing, or had seduced. Upon a bill to enforce the deed and a cross bill to cancel it, the Court at first considered that it could not interfere for either party, but ultimately ordered the deed to be cancelled, and that *A. B.* should pay the costs of both suits, except those of the father.

**I**N 1852, a copyhold estate stood limited to Mr. *B.* for life, with remainder to his children equally, of whom there were five, viz., *C.* and four others.

In 1852 Mr. *B.* mortgaged his life estate to his brother-in-law, Mr. *T.*, for 1,000*l.*, who also advanced him a further sum of 100*l.* In 1853, by a deed endorsed on the last mortgage, Mr. *B.* and his children (three of whom were infants) covenanted to surrender the copyholds to Mr. *T.* to secure two sums of 300*l.* each, for which he was surety.

In 1855, scandalous reports got abroad in the town where the parties were resident, as to an improper connection between the Plaintiff, Mr. *W.*, a married man of considerable age, having a family, and Mr. *B.*'s daughter *C.* Mr. *T.* remonstrated with Mr. *B.*, his brother-in-law, on the subject, and stated, that if Mr. *W.*'s visits to Mr. *B.*'s house were allowed to continue, all communication between Mr. *T.* and Mr. *B.* must cease.

At this time, the amount due to Mr. *T.* was 1,700*l.*, and, according to *W.*'s statement in his answer, Mr. *T.* was then pressing for payment of his debt, and threatening to sell the estate, and he, *W.*, "finding Mr. *B.* unable to procure money elsewhere, offered at length, one day, to relieve him and his family from the prospect of having the estate taken from them, by advancing the necessary amount to pay off *T.*"

Accordingly,

Accordingly, by an indenture dated the 20th *August*, 1855, Mr. *B.* and his children covenanted to surrender the copyholds to Mr. *W.*, by way of mortgage, for securing 1,700*l.*

This deed was executed by Mr. *B.* and his daughters *M.* and *C.*, but not by the other children, and no surrender had been made. The money was applied in paying off *T.*

It appeared that *W.* succeeded in seducing the daughter *C.*, and that an illicit connexion continued between them for some time afterwards.

The first suit was instituted by *W.* against Mr. *B.* and his daughters *M.* and *C.*, to foreclose.

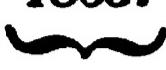
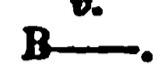
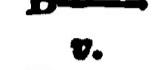
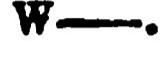
The second suit was instituted by Mr. *B.* and his two daughters, praying to be relieved from the deed of the 20th of *August*, 1855, and that the same might be cancelled. It alleged that the Plaintiff *W.* had, under gross and scandalous circumstances, seduced the daughter *C.*, that the advance by mortgage, in 1855, was made to enable him to carry on a criminal intercourse with her, and also that the deed had been executed under undue influence and parental control, and without receiving any consideration or independent proper advice (*a*).

The cause was heard in private, part of the evidence being of a grossly indelicate nature, but the Court gave its judgment in public.

*Mr. Selwyn and Mr. Dauney for Mr. W.*

*Mr.*

(*a*) See *B— v. W—*, 31 *Beav.* 342.

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*v.*  
  
*B*—  
  
*B*—  
*v.*  
  
*W*—

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B—

B—

W—

**Mr. Baggallay, Mr. C. Hall, and Mr. Rowcliffe** for the Defendants in the first suit.

The following authorities were cited:—As to parental influence: *Archer v. Hudson* (a); *Espey v. Lake* (b); *Maitland v. Irving* (c). As to the immoral nature of the contract: *Evans v. Carrington* (d); and see *Bally v. Chester* (e); *Benyon v. Nettlefold* (f). As to the daughters, as sureties, being relieved by reason of the infant children not having executed the mortgage when they came of age as was intended: *Evans v. Bremridge* (g).

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### *The MASTER of the ROLLS.*

Mar. 17.

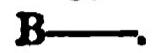
This is a case which has caused me considerable pain; but I can state very shortly why I think that this deed cannot be supported.

There are two suits, one to enforce a deed of the 20th of *August*, 1855, by which, in consideration of 1,700*l.* lent by the Defendant Mr. W. to Mr. B., Mr. B. and his five children (two only of whom were adult) covenanted to surrender copyholds for securing that amount. The second suit is instituted by B. and his two daughters to set that deed aside.

The case is a very painful one in this respect:—It appears that Mr. W. seduced C., one of Mr. B.'s daughters, and that in *June*, 1855, Mr. T., a brother-in-law of Mr. B., had pointed out to him the attentions

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|--------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| (a) 7 <i>Beav.</i> 551, <i>affirmed</i> 15<br><i>L. J. (Chanc.)</i> 211. | (e) 5 <i>Beav.</i> 103.<br>(f) 3 <i>Mac. &amp; Gor.</i> p. 100,<br>n. (c).<br>(g) 2 <i>Kay &amp; J.</i> 174, and 8 <i>De<br/>G., M. &amp; G.</i> 100. |
| (b) 10 <i>Hare</i> , 260.                                                |                                                                                                                                                       |
| (c) 15 <i>Sim.</i> 437.                                                  |                                                                                                                                                       |
| (d) 2 <i>De G., F. &amp; J.</i> 481.                                     |                                                                                                                                                       |

attentions paid to his daughter by Mr. *W.*, that it was a matter of notoriety in the town in which they resided, and that it was essential to put a stop to it. At the same time, Mr. *T.* told him he should require the money due to him to be repaid, which consisted of 1,100*l.*, and two sums of 300*l.* each for which he was surety. When *T.* required the money to be repaid, Mr. *B.* applied to Mr. *W.* for an advance. A day or two after, in *June*, 1855, in consequence of the strong remonstrances of Mr. *T.* and of Mrs. *T.*, who was the aunt of this young lady, Mr. *B.* wrote a letter to Mr. *W.*, in which he told him, that in consequence of the reports, he must discontinue his visits to his house. In answer to this, Mr. *W.* wrote that there was no truth in the suggestion, but that he acquiesced in the propriety of the refusal to allow a continuance of his visits. On the following day after writing this letter, Mr. *W.* wrote to Mr. *B.* and told him that he would advance the money required by Mr. *B.*, and a treaty took place, and it was arranged that the advance should be made, and it was effected on the 20th of *August*, 1855, about two months after.

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 W —

It is impossible to read the letters and the evidence in this case, and not come to the conclusion, that a part of the consideration for the advance of the money by Mr. *W.* and for the security which was given, was a promise that *W.* should be at liberty to continue his visits to the daughter. It is impossible that the father should not have been aware, after all the representations made to him by Mr. *T.* and by the public talk, that Mr. *W.* had, at that time, actually succeeded in seducing, or that he was attempting to seduce, his daughter. It is impossible to doubt the fact, that the money was given, in order that Mr. *W.*

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*May 2.*

Application for the appointment of a new trustee in the place of a tenant for life with power to appoint new trustees, who had been found lunatic, refused until a committee had been appointed and had been served with the petition.

**A** TENANT for life, who had a power to appoint new trustees, had been found lunatic by inquisition, but no committee had as yet been appointed.

A petition was presented by some of the *cestuis que trust*, under the 13 & 14 Vict. c. 60, s. 32, for the appointment of a new trustee in the place of the lunatic.

Mr. *Baggallay* and Mr. *G. Simpson*, in support of the petition.

Mr. *Selwyn* and Mr. *S. Percival*, for the other trustee and some of the persons beneficially interested, referred to the 16 & 17 Vict. c. 70, s. 137, which provides that where a power is vested in a lunatic in the character of a trustee, and it appears to the Lord Chancellor expedient that the power should be exercised, the committee, under an order of the Lord Chancellor, may exercise the power.

They submitted that the jurisdiction was in the Lord Chancellor, and that it could not be exercised in the absence of the committee. They referred to *In the Matter of Bowmer* (*a*); *Webb v. The Earl of Shaftesbury* (*b*).

Mr. *Baggallay* in reply. The Court is exercising its jurisdiction under the Trustee Act, and not executing the power, the statute cited is therefore inapplicable.

*The**(a) 3 De Gex & Jones, 658.**(b) 7 Ves. 480.*

*The Master of the Rolls.*

I think this is a proper case to appoint a new trustee (*a*), but I cannot do it in the absence of the committee.

*Mr. Baggallay.* The committee will be appointed on *Wednesday*.

*The Master of the Rolls.*

Then let the petition stand over until *Friday* to serve the committee.

(*a*) *Re Davies*, 3 Mac. & Gor. 278.

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*Re  
PARKER'S  
TRUSTS.*

### *Re THE TORQUAY BATH COMPANY.*

*May 2, 4.*

THIS company was formed under the 7 & 8 Vict. c. 110, and had only been registered under the act of 1856 (18 & 19 Vict. c. 47).

A company, registered under the Act of 1856 (18 & 19 Vict. c. 47), but not under the Act of 1862 (25 & 26 Vict. c. 89), may be wound up voluntarily, under a resolution passed after the latter act came into operation.

Mr. The words "unregistered company," in the 25 & 26 Vict. c. 89,

s. 199 (2), mean a company not registered under any act, and not a company unregistered under that act.

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*Re*  
 THE TORQUAY  
 BATH  
 COMPANY.

Mr. *J. Napier Higgins*, in support of the petition, argued, that the resolution to wind up voluntarily was ineffectual, inasmuch as a company not registered under the act of 1862 could not be wound up voluntarily. That the 25 & 26 Vict. c. 89, s. 199, defined the term "unregistered company," by declaring that all companies "not registered under this act, and hereinafter included under the term 'unregistered company' may be wound up." That division (2), which followed, was precise, that "no unregistered company shall be wound up under this act, voluntarily or subject to the supervision of the Court." That the words "unregistered company," in this section, meant companies not registered under that act; *In re The Waterloo, &c. Company* (a); *Re Minima Company* (b).

Mr. *Cracknell*, for the company, in opposition to the Petitioner. The words "unregistered company," in the 199th section, mean companies not registered at all, and not those which have been duly registered under former acts. Part 6 of the act of 1862 shews that that act applies to companies already registered, and it refers to the application of that act "to companies registered under the prior joint stock companies acts;" thus the 176th section says, that the last act (1862) shall apply to companies registered under the former acts, in the same manner as if such company had been formed and registered under this act (1862). The effect, therefore, of the 175th and 176th sections is to give to this company the same powers and privileges as companies registered under this last act (1862). Prior to the last act, it is clear that this company might have been wound up voluntarily, and to hold that it cannot now be so wound up would be to deprive it of an "existing right"

(a) 31 *Beav.* 586.(b) 8 *L. T. (N. S.)* 109.

right or privilege," which is saved by the act (see 25 & 26 Vict. c. 89, s. 206 (3)). He observed that the *Waterloo Case* turned on its being an insurance office, and that the point in question had not really been decided in the *Minima Case*. He added that this company was still willing to register under the last act, if thought necessary.

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Re  
THE TORQUAY  
BATH  
COMPANY.

### *The Master of the Rolls.*

The only question arising on this petition is as to the construction of the 25 & 26 Vict. c. 89, and is this:—whether, under the 199th section, this is a company which can be wound up voluntarily without being re-registered under that act. One of the shareholders objects to the voluntary winding up, and he brings the matter before the Court by this petition.

May 4.

The objection made is, that, under the 199th section, clause 2, "no unregistered company" is to be wound up voluntarily, and it is argued, that this means "no company not registered under the act of 25 & 26 Vict. c. 89," and that this company cannot be so wound up, as it has only been registered under the act of 1856. The first part of the 199th section is referred to to shew the construction to be put on those words. They are these: "subject as hereinafter mentioned," any company "not registered under this act and hereinafter included under the term unregistered company, may be wound up under this act, and all the provisions of this act with respect to winding up shall apply to such company, with the following exceptions and additions."

From this it is contended, that the words "not registered under this act" define the words "unregistered company,"

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*Re*  
 THE TORQUAY  
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 COMPANY.

company," and establish that a company registered under former acts is included in the term "unregistered company." I am of opinion, that this is not the right construction of the words of the act, because, if so, there would be no reason why the clause should go on to say, "and hereinafter included under the term 'unregistered.'" I think the expression refers to those not registered under this act, and those thereafter defined, that is, companies which have not been registered under this act or under any other act, of which companies there were many, as insurance companies. I think that the words "unregistered companies" cannot be limited to the confined sense contended for by the Petitioner. *Prima facie*, the words "unregistered company" mean those not registered under any act, and to put any restriction upon them I must find something in the act itself to justify me. This company has been registered under the act of 1856, and I find nothing in the act, and I have read all of it which has any application to the subject, which shews any intention to repeal the effect of the prior registration. It is true that the act of 1862 repeals the act of 1856 (s. 205); but it does not invalidate "anything duly done under any act thereby repealed;" nay more, it reserves any "right or privilege acquired" under such prior acts, one of which is, the right arising from registration. Then why should not the registration under the act of 1856 have its full effect? If this previous registration under the former act was to go for nothing, the last act would have expressed it.

But when I refer to the clauses in Part VI. of the act of 1862, I think it quite clear that it applies to companies already registered, and this was one of them. The 176th section says, that this act shall apply to companies already registered, in the same manner as if they "had been

been formed and registered under this act," and if I were to hold that "unregistered companies" meant only those registered under the act of 1862, I should be repealing this section. Besides this the 177th section adds, that this act of 1862 "shall apply to companies registered but not formed under" the previous act.

1863.

Re  
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COMPANY.

No doubt this is an important question, but the more I consider it, the more I feel satisfied, that the act of 1862 contains nothing which repeals the effect of the prior registration, and that it is not necessary to go through the ceremony of re-registration, in order to enable a company to wind up its affairs voluntarily. That mode is not always the best, unless the proceedings are carefully watched; but as before the last statute the shareholders of a registered company had a right to have it wound up voluntarily, so in my opinion they have still the same powers without a re-registration under the act of 1862.

This petition must be dismissed, but without costs.

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1863.



**BEAUMONT v. CARTER.**  
**CARTER v. BEAUMONT.**

*May 23, 25.*

On Tuesday, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on herself," and that the wedding was to take place on Saturday. They married, unknown to the trustee, on Wednesday, without any settlement.

Held, that this letter contained no settlement or agreement for a settlement binding on the husband or wife.

**I**N June, 1856, Mr. Beaumont was sole trustee for his cousin Miss Morton of 1,180*l.* 19*s.* 9*d.* Consols, to which she was entitled under her father's settlement, to her separate and inalienable use, and to 424*l.* 5*s.* 6*d.* Consols, to which, together with a reversionary interest in certain Irish estates, she was absolutely and unconditionally entitled under her father's will.

In May, 1861, Miss Morton, who was about thirty-two years of age, accepted a proposal of marriage from Mr. Carter, who was then not quite twenty years old. The marriage appeared to be approved of by the father and mother of the bridegroom, but not by the relatives of the bride.

On Tuesday the 7th of May, 1861, Mr. Carter wrote from Cornwall to Mr. Beaumont in London as follows:—

"As you have already heard, I am about to be married to your cousin Mina Morton, who has acquainted me with the fact that you are her executor and guardian, I therefore address you as such, and beg that you will, as speedily as possible, arrange matters concerning her little property. *I especially wish it entirely settled on herself*, lest her friends might think I had pecuniary reasons in marrying her," &c., &c., &c. "I hope, therefore, you will raise no objection likely to delay our wedding, which is to take place on Saturday next, as I am anxious to return again to my studies."

This

This letter was received on the next day (the 8th of *May*, 1861), and on the same day Mr. *Beaumont* answered as follows :—

“ With regard to the matter of a settlement of my cousin’s little property, no doubt it ought to be settled, and I quite appreciate your honorable feeling in the matter. Of course, as to this again, the short notice causes much difficulty; in truth I have not been able to attend it to-day and with difficulty find time for this letter, and yet, though without any instructions from her on the subject, I feel that I must manage to arrange something satisfactory in the course of to-morrow. It will, however, necessarily be only in the form of an agreement, to be concluded in more complete form after the marriage, and being without any precise instructions, it will have to be in only a very loose and general form. Perhaps you will be kind enough to let my cousin (to whom I cannot write to-day, and from whom I have not heard a word) see this letter. With my best love to her and again urging upon you the propriety of delaying the marriage, even if it be only a week or two, I am, &c.”

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On the 9th of *May*, 1861, and before any more formal agreement could be prepared by Mr. *Beaumont* in accordance with the letter of the 7th *May*, 1861, from Mr. *Carter*, Mr. *Beaumont* received another letter from the Defendant as follows :—

“ *May* 8th, 1861.

“ Sir,—Since writing to you yesterday, circumstances have caused us to alter our plans, and *Catty* and I were united this morning.

“ Yours very sincerely,

“ *George Canning Carter.*”

The parties were, as stated, married on the 8th of
 .
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*May, 1861*, and no settlement whatever was executed on their marriage. On the 30th of *May, 1861*, Mrs. *Carter* informed Mr. *Beaumont* that she wished her little property to be settled, but nothing was done in the matter.

Mr. *Carter* came of age on the 14th of *July, 1862*, and Mr. *Beaumont*, the trustee, hesitated, in consequence of Mr. *Carter's* letter prior to the marriage, as to whether he ought to pay over the fund. He ultimately instituted this suit, in 1862, against Mr. and Mrs. *Carter*, submitting that Mr. *Carter* ought to be decreed to make and execute such settlement of the unsettled property of Mrs. *Carter* as this Court should think fit to direct, in pursuance of the aforesaid antenuptial agreement to that effect, and the bill prayed accordingly.

A cross bill was filed by Mr. and Mrs. *Carter* to compel payment of the trust money.

Mr. *Hobhouse* and Mr. *E. F. Smith* for Mr. *Beaumont*.

Mr. *Selwyn* and Mr. *G. Hastings* for Mr. and Mrs. *Carter*.

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### The MASTER of the ROLLS.

*May 25.* The principal question raised and argued before me was, whether Mr. *Carter's* letter of the 7th of *May, 1861*, created any settlement binding on the husband or the wife. I entertain no doubt that this letter created no settlement or agreement for a settlement binding either the husband or wife. The utmost that could be said

said of it is :—that it might raise a question of sufficient doubt to justify a trustee in refusing to part with the funds in his hands until the opinion of the Court had been obtained on that subject, for until Mr. *Carter* attained twenty-one, he was incapable of giving any receipt or expressing any binding opinion on the matter. It is true that on the 30th of *May*, 1861, Mrs. *Carter* informed Mr. *Beaumont* that she wished her little property to be settled, but this expression of a married woman amounted to nothing. The letter of Mr. *Carter*, even if he had been adult, would have been no agreement for a settlement, and being an infant, as he was, it amounted literally to nothing. Mr. *Beaumont* might certainly, with perfect security, have paid the income of Mrs. *Carter's* trust property to her on her separate receipt until Mr. *Carter* came of age on the 14th of *July*, 1862.

Unfortunately, Mr. *Beaumont* took a very exaggerated view of his duties as trustee; he paid, since the marriage, two sums, one of 14*l.* and the other of 25*l.*, but he declined to pay any more, unless, by personal communication with Mrs. *Carter*, unfettered by the presence of her husband, he could be satisfied that she was not acting under any compulsion from him. The result of all that was, that on the 4th of *August*, 1862, the Plaintiff Mr. *Beaumont* filed his bill in *Beaumont v. Carter*, and on the 5th of *August*, 1862, the Defendant filed his bill in *Carter v. Beaumont*.

His Honor (after referring to an arrangement which he thought ought to have been acted on, and to some affidavits brought forward by the Plaintiff from a lodging-house keeper, disclosing, and as it appeared to the Court aggravating, certain matrimonial discussions between the Defendants), said, these affidavits could not

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not but be viewed with great dissatisfaction by the Court. When an application is made to the Court, that a fund belonging to a married woman, and not subject to any settlement, should be paid out, the Judge takes what pains he can to ascertain that it is the free and unbiassed wish of the lady that it should be paid to the husband, instead of its being settled on herself and her children, and he would attend to any suggestion made by or on behalf of the trustee, or indeed by any relative of the wife, and he would take the greatest pains he could to ascertain that this was the unbiassed wish of the lady, and to be as sure of this as the nature of such things will admit ; but if this Court were to permit, under such circumstances, the trustee to enter into a detail of the conduct of the husband and wife to each other, and to make charges of cruelty and misconduct against the husband, this Court must, in that case, permit the husband to answer and disprove those allegations, and this Court would be involved in discussions suitable only to the tribunal which is specially devoted to the determination of matrimonial causes, and which could rarely influence the application of the lady's money. In my opinion this Court should express its disapprobation of such a course at the earliest time and in the strongest manner.

His Honor directed the dividends of the 1,180*l.* 19*s.* 9*d.* Consols to be paid to Mrs. Carter on her separate receipt, and said he would order the 424*l.* 5*s.* 6*d.* Consols either to be settled or paid as she should direct upon a separate examination, but he gave no costs on either side.

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NOTE.—See *Page v. Horne*, 9 Beav. 570, and 11 Beav. 227.

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*Re THE BATTERSEA PARK ACTS.**Re ARNOLD.*

BY the act of 9 & 10 Vict. c. 38, the *Battersea Park* commissioners were empowered to take lands compulsorily, for the formation of the park, six months after notice (s. 15). By the 19th section, the commissioners were empowered to treat and agree for the purchase of the necessary lands, and to enter into contracts for that purpose. By the 22nd section, within one month after notice, the persons interested are to deliver a statement of the particulars of the estate claimed by them, and of the amount they are willing to receive for the value of such estate, and, by the 23rd section, in case of disagreement, then the amount is to be assessed by a jury.

What occurred in the present case was as follows:—  
**Mr. Jas. Arnold** was seised in fee of some lands required by the commissioners, and on the 30th of September, 1846, the commissioners gave the usual notice that they required these lands, and requiring a statement of his claim. On the 27th of October, 1846, Mr. Arnold sent a letter requiring 1,250*l.* for the land. No answer was returned to this on the part of commissioners, and nothing further was done during the lifetime of Mr. Arnold. He died on the 10th of November, 1846, intestate, leaving a widow and four children. The eldest son, *Taylor Arnold*, was then an infant, but he attained twenty-one on the 18th of September, 1861. After the death of the testator, negotiations were renewed between the commissioners and the family, but no new contract was entered into. All parties ultimately appeared

*May 30.*

Commissioners having compulsory powers to purchase lands, gave notice to an owner of free-holds of taking them and to treat. He, in reply, stated the price he was willing to take, but he died before the acceptance of the offer. The purchase was afterwards completed at that price.

*Held*, that the real estate had not been converted into personality at the death of the owner, and that the purchase-money belonged to his heir-at-law.

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appeared willing that the 1,250*l.* should be the amount of compensation, and on the 23rd of *March*, 1863, the commissioners (whose compulsory powers had expired on the 7th of *August*, 1853) paid the 1,250*l.* into Court. This sum was now claimed both by the personal representatives and by the heir at law of Mr. *Arnold*, and this petition was presented by the administrator of Mr. *Arnold* for payment to him of the fund.

**Mr. Selwyn** and **Mr. A. E. Miller**, for the Petitioner. The notice given by the commissioners to treat, followed by a claim of 1,250*l.*, which was not rejected, amounted to a valid contract between Mr. *Arnold* and the commissioners, and it converted the property from realty into personality, or, at least, it was tantamount to a binding contract. This case differs from *Haynes v. Haynes (a)*, where nothing had been done beyond giving a notice to treat. The contract now existing, under which the money has been paid into Court, must be that entered into in the intestate's lifetime; for otherwise there could be no power to purchase, as the compulsory powers of the commissioners have long since ceased. Where a public company or commissioners, having compulsory powers, give notice that they intend to take certain lands, they are bound and may be compelled to take them; the land is theirs, and nothing remains to be done but to settle the amount of compensation under the act, either voluntarily by arrangement, or by a jury. The land thenceforth belongs to the company, and the compensation, when determined, to the land-owner. They cited *Walker v. The Eastern Counties Railway Company (b)*; *The Regent's Canal Company v. Ware (c)*; *Marquis of Salisbury v. The Great Northern Railway*

(a) 1 *Drew. & Sm.* 426.  
(b) 6 *Hare*, 594.

(c) 23 *Beav.* 575.

*Railway Company (a); Pinchin v. The London and Blackwall Railway Company (b); Hedges v. Metropolitan Railway Company (c); Sugden's Vendors (d); and see Gardner v. The Charing Cross Railway Company (e).*

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Mr. Southgate and Mr. Lewis, for the heir at law, were not called on.

Mr. Hanson for the commissioners.

The Master of the Rolls.

Where there is a binding contract between parties for the sale of real estate not subject to any settlement, either under an act of parliament or otherwise, the property sold is converted from the real into the personal estate of the vendor: the land ceases, in equity, to be his real estate, and on the death of the vendor before the completion of the contract, his legal personal representative is entitled to the purchase-money. Although these acts create some difficulty, by reason of the compulsory powers given by them, still the principle applicable to such cases is the same, and unless, at the death of the owner of the land, there be a valid and subsisting contract which can be enforced against the heir, the land itself and the money ultimately payable for it belongs to the heir.

The only question I have to consider is, whether, in this case, there really was, at Mr. Arnold's death, a binding contract which the *Battersea Park* commissioners could have enforced against him and his heir.

It

(a) 7 *Rail. Cas.* 175.

(c) 28 *Beav.* 109.

(b) 1 *Kay & J.* 34, and 5 *De
Gex, M. & G.* 857.

(d) *Pages* 66, 160 (13th edit.)
 (e) 2 *John. & Hem.* 248.

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It is established that as soon as the company gives notice that they intend to take the land, if nothing further takes place, the person to whom the notice is given may compel them to take it. But it is equally certain that, unless something more be done, there is no contract in existence which can be enforced against the heir; that is explained by Vice-Chancellor *Kindersley* in the case of *Haynes v. Haynes* (a), who points out that, in such a case, you could not file a bill for specific performance, for nothing is settled and the price must be fixed, without which it is impossible to say that there is any binding contract.

If there had been no act of parliament, and *A. B.* had said to the company, "I will sell you my land for 1,250*l.*," it is clear, that if no answer had been sent until after the death of *A. B.*, his heir would not have been bound by the offer of his ancestor or compelled to complete. He might say, "I will not sell the land at all, you ought to have accepted the offer in the lifetime of my ancestor, but now it is not binding upon me." The question here is, whether the case is varied by the act of parliament, which entitles the commissioners to give notice to take the land compulsorily. The commissioners gave notice to Mr. *Arnold* to take his land; within a month, he wrote to say, I want 1,250*l.* for it; the commissioners took no notice of this offer until after his death. On his death they were not bound to give 1,250*l.* for the land; they might still dispute the price, and have it settled by a jury or by arbitration. If then the commissioners were not bound, how could the heir be bound, and how can there be a contract, unless the terms are ascertained, the most important of which is the amount of the purchase-money? If there was no contract

(a) 1 *Drewry & Smale*, 426.

tract which the company could enforce by means of a bill for specific performance against the heir, there was not, in my opinion, any contract binding on the heir.

I repudiate altogether the distinction attempted to be drawn between a binding contract and something tantamount to a binding contract. I think no such distinction exists, anything tantamount to a binding contract is itself a binding contract; but an offer not accepted in the life of the owner cannot create a binding contract, and this is, if any thing, stronger in the case of a company acting upon its compulsory powers.

That being my view of this case, I am of opinion, that there is no contract binding on the heir, and that, if he thought fit, he might resist the amount proposed to be paid to him, and have the value ascertained by a jury. I do not think that the case of *The Marquis of Salisbury v. The Great Northern Railway Company* bears out the Petitioner's proposition.

I am of opinion, that the judgment of Vice-Chancellor *Kindersley* presents an accurate view of the law on the subject, and I shall follow it. If I were to hold otherwise, I see no means of avoiding this dilemma: I must either hold that, when notice to treat has been given, the property is converted from the date of the notice, or that there is no binding contract until the terms of it have been settled, in such a manner as to bind the contracting parties, just as if they were not acting under the compulsory powers conferred by statute.

I am of opinion, that, in this case, there was no con-
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tract until the amount of the purchase-money had been ascertained, which was not done in the lifetime of Mr. Arnold.

I am therefore of opinion, that at the death of the intestate, this was real estate, and that his heir is now entitled to the purchase-money.

ATTORNEY-GENERAL v. CLIFTON.

May 22, 23.

The Court having inferred, from reference to the parish church in the deed of endowment, that a school, founded in 1601, was a Church of England school, held, that the trustees and the schoolmaster also (if possible) ought to be members of that church, but that the instruction was open to scholars of every religious denomination.

The Court, though holding a trustee to have been originally improperly appointed, declined to remove him.

Residence within a parish being a necessary qualification of trustees on their appointment, held, that their removal out of the parish after their appointment, to such a distance as to make it impossible to attend to their duties, would be a vacating of their office.

A CHARITABLE trust was created by an indenture dated the 24th of April, in the 43rd year of Elizabeth (1601). It was made between Thomas Dowse of the one part, and eight of the inhabitants of the town of Broughton, in the county of Southampton, of the other part. It commenced with the following recital :—

“ Forasmuche as there are verye manye people dwellinge within the towne and mannor of Broughton and Bossington, in the countye of South', and manye chil- dren and youth doth there dayly encrease, which, for want of teachinge and instrucccon, are bred upp in rudenes and ignorance, the cause of muche error and enormity in the common wealthe, WITNESSETH therefore these presents, that the said Thomas Dowse, to and for the maintenance and contynuance forev^r hereafter of a schoolmaister, for the instrucccon and teachinge of the children

children and youth of th' inhabitants within the said parish of *Broughton*, to reade, write and cast accompts, to th' entent thereby, they may be the better enabled to knowe and serve Almyghtye God, obey their Sovaigne Prince and parents, and maye be more apte and readilie prepared either for schooles of higher learninge, or otherwyse to serve and be bound as apprentice in some lawdable trades and science, or els be employed in husbandrye or other good laboure and course of lyef for gettinge of there lyvinge, and in consideracon of the some of twelve pence of lawfull English money to hym the said *Thomas Douse* in hand paid by the said inhabitants."

Douse then conveyed certain hereditaments at *Broughton* and elsewhere to the eight trustees, upon trust to receive the rents, "for and to the maynteynance and contynuance of suche a meete and fitt schoolmaister as the said *Frauncis Harris*, *Thomas Tutt*, *John Thrustinge*, *John Hawtett*, *Henry Kelsey*, *Robert Ecton*, *Frauncis Bedford* and *Augustyne Leefe*, or the more part of them for the tyme beinge, shall place, lymitt or appoynte, to be residente and abydinge within the said parishe of *Broughton*, for the teachinge and instructinge of the children of such as shall inhabite within the towne and mannor of *Broughton* and *Bossington* or within the pishe of *Broughton* aforesaid to reade, write and caste accompts as aforesaid."

He then ordained and appointed that whensoever the trustees should "growe olde or fewe in nomber," that then the same lands should be passed "to other such psons of good credite, truste and honestye of the said pish of *Broughton*, and their heires."

The deed then stated, that *Thomas Douse* had resolved

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resolved to acknowledge the deed in chancery, "and that one parte thereof shalbe comitted to the custody and safe keepinge of the *churchwardens* for the tyme beinge of the said pish of *Broughton*, and shalbe there entred and remayne, for memory, in the booke of the said pishe, commonly called the booke of chrisenings and burialls." It provided, that if there should at any time be no schoolmaster provided, "and notice thereof publiquelye given in or forthwith after the tyme of divyne service to be said in the pish churche of *Broughton* aforesaid, at or in two severall sondayes," then that he (the founder) might receive the rents until the trustees appointed another schoolmaster.

The income of the property was now about 80*l.* a year.

This information was filed by the Attorney-General, with the approbation of the Charity Commissioners, against the six present trustees. The matters complained of were, that one trustee had never resided in the parish; that three of them resided at a distance, and that one was a Dissenter: that the late schoolmaster, who died in 1862, had been a Dissenter, and that the trustees had allowed him to discontinue the use of the Church Catechism in the school, and to delegate his office, and to make and enforce a rule that no boy should be admitted to the school who was unable to read.

That in consequence of the aforesaid acts and defaults of the trustees, the school had fallen into disrepute, and that the number of boys attending at such school for instruction had gradually diminished from forty, which was the number in the year 1835, to thirteen in the year 1861.

The

The information prayed a scheme, the removal of the trustees who were disqualified, and an injunction to restrain the trustees from appointing a new school-master, and from dealing with the property.

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Mr. Cole and Mr. Kay, in support of the information.

Mr. Selwyn and Mr. Townsend for the trustees.

Mr. Cole in reply.

The points argued were, whether this was a Church of *England* school, and whether Dissenters could have the benefit of it, or be appointed trustees or school-masters of it, and whether any of the present trustees ought to be removed.

Attorney-General v. Calvert (a); Re Ilminster School (b); Baker v. Lee (c); Attorney-General v. The Earl of Stamford (d); In re Chelmsford Grammar School (e); Attorney-General v. The Governors of the Sherborne Grammar School (f); In re Stafford Charities (g); Attorney-General v. Cullam (h); 23 Vict. c. 11, were cited.

The MASTER of the ROLLS.

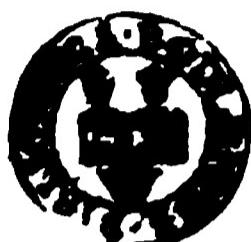
On carefully reading over the whole of this deed of endowment, I am satisfied that this was a Church of *England* charity, and that the founder, who was a member of the

May 23.

- (a) 23 Beav. 248.
- (b) 2 De Gex & Jones, 535.
- (c) 8 H. of L. Cas. 495.
- (d) 1 Phill. 737.

- (e) 1 Kay & J. 543.
- (f) 18 Beav. 256.
- (g) 25 Beav. 28.
- (h) 1 Y. & C. C. 411.

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the Church of *England*, intended to promote the instruction and teaching of the children of the inhabitants of the parish generally. I infer this not only from the time when the instrument was executed, which was towards the end of the year 1601, when there was very little dissent, but also from the repeated references to the parish church, in which place many things were to be done relating to the charity.

That being my opinion, I must refer to the distinction taken by me in the case of *The Attorney-General v. Calvert* (a) between the three species of charity, viz., religious charities, educational charities and eleemosynary charities. This is clearly an educational charity, in regulating which you must attend to these three things, viz., the persons to be constituted trustees, the masters who are to instruct, and the pupils who are to receive the instruction. I am clear that this is not a charity the benefit of which is to be confined to members of the Church of *England*. Pupils of all denominations are entitled to have the benefit of the instruction. But as the charity is a Church of *England* charity, members of the Church of *England* must be appointed its trustees, in order to prevent any perversion of its funds, though persons not belonging to that church may participate in the advantage to be derived from the charity. Provision must therefore be made, that, in affording religious instruction, it must be done in such a manner as not to exclude persons who are not members of the Church of *England*.

As to the schoolmaster: I do not think it is necessary that he should be a member of the Church of *England*, though I am of opinion, *ceteris paribus*, that he

(a) 23 *Beav.* 248.

be ought to be a member of that church. At the same time the trustees would not, in my opinion, commit a breach of trust by appointing a Dissenter to be schoolmaster, but the circumstances must be peculiar to justify it.

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With regard to the trustees: There is, as to qualification, a great difference between appointing them in the first instance, and removing them when once appointed. Lord Cottenham takes that distinction in *The Attorney-General v. The Earl of Stamford* (a), and I intend to follow his ruling on this occasion. I do not think that the trustee who is a Dissenter ought now to be removed, but I think that the appointment of the trustee who was not an inhabitant of the parish at the time, was not a proper appointment. If the others have removed from the parish since their appointment to such a distance as to make it impossible for them to attend to their duties, this would be vacating their office. But on looking at the books, I find that three, four or five out of six have always attended the meetings, and I see no reason to doubt that they have, to the best of their ability, attended to the affairs of the charity, except with respect to the schoolmaster. They appear to have appointed an improper person to be schoolmaster: and this merely because his father had been schoolmaster before him. Whereupon, the charity being founded to teach children “to read, write and cast accounts,” he laid down a rule that no one should be admitted who could not read. This was obviously an improper resolution, and the effect of it was to reduce the number of scholars to one-third of what it had previously been. This schoolmaster is dead and no person has as yet been appointed to his place. I do not think it desirable on account of what

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(a) 1 *Phil.* 743.

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has occurred as to the late schoolmaster to remove the present trustees.

I propose to fill up the original number of trustees, and to direct that, in doing so, regard be had to the instrument of endowment, and to provide that they shall be members of the Church of *England*. I shall direct a scheme to be settled for the future management of the charity, and, in settling it, to have regard to any other means of instruction which may exist at present in the parish. All parties will have their costs out of the charity funds; I shall order them to be taxed, but make no order for their payment at present. A sinking fund must be provided for this purpose.

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#### FISHER *v.* BRIERLEY. (No. 4.)

June 1.

A testatrix directed a church to be built, and as soon as built she gave 5,000*l.* for the endowment of the minister, "but without any interest in the meantime." The building of the church was delayed several years by litigation, and no minister had been appointed. The Court declined to decide, in the absence of

THIS case, reported *ante* (a), again came before the Court, the decision of the Lords Justices (b) having been affirmed by the House of Lords (c).

The testatrix, who died in 1857, gave 5,000*l.* to the Bishop of *Chester*, to be paid when a church had been erected "but without any interest in the meantime," the income of which was to be paid to the minister of the church. In consequence of the protracted litigation no church had been erected, and the legacy had not yet been paid.

The question whether interest was payable on the 5,000*l.*

(a) 30 *Beav.* 268.

(c) 10 *H. of L. Cas.* 159.

(b) 1 *De G., F. & J.* 643.

the minister, whether any interest was payable on the legacy, but intimated that the interest before an appointment of a minister would not form part of the capital.

5,000*l.* and on legacies of 1,500*l.* and 500*l.* given to provide for the schoolmaster and books was again argued by

**Mr. Hobhouse, Mr. Dickenson, Mr. Fischer, Mr. Selwyn, Mr. C. C. Barber and Mr. Shapter.** They cited *Pulteney v. Warren* (a); *Grant v. Grant* (b); *Attorney-General v. The Bishop of Chester* (c).

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I think it premature to determine the point, as at present no minister has been appointed, and I think the legacy ought to be accumulated until one is appointed, and then I shall have the proper person to contest the point.

I am of opinion that the interest in question is not capital and never will be capital. The testatrix has given 5,000*l.* at a particular period, and the income of it to the officiating minister. I have a difficulty in deciding the present point in the absence of the officiating minister. I propose to carry the three sums of 5,000*l.*, 1,500*l.* and 500*l.* to the account of these legacies, and direct them to be invested and accumulated; but such carryings over are to be without prejudice to the question, if any interest is payable and from what time it is payable.

(a) 6 *Ves.* 92.
(b) 4 *Russ.* 598.

(c) 1 *Bro. C. C.* 444.

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June 1, 2.

A testator, by his will, said, "I give to my wife all my household furniture, plate," &c. "and other effects of the like nature, and all wines," &c. "which shall, at my decease, be in or about any dwelling house then occupied by me." Held, that, in construing the bequest, the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part. Held, therefore, that it passed plate at the testator's bankers, family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, &c. deposited for safe custody at a warehouse.

DOMVILE v. TAYLOR.

COMPTON CHARLES DOMVILE died in 1852, leaving his father Sir *Compton Domvile* and the Plaintiff, his widow, surviving him.

By his will dated in 1847 he bequeathed as follows:—

"I give to my said dear wife *Isabella Maria Domvile* the sum of 500*l.* for immediate use, to be paid or retained out of the first moneys which shall come to the hands of my trustees and executors. And I also give to my said wife all my household furniture, plate, jewels, plated articles, linen, china, glass, books, pictures, musical instruments and other effects of the like nature, and all wines, liquors, fuel, housekeeping provisions and other consumable stores which shall, at my decease, be in or about my dwelling-house then occupied by me."

The question upon the special case was, what passed under the bequest under the following circumstances. It appeared that the testator's grandfather had bequeathed his family plate to the testator's father, Sir *Compton Domvile*, for life, with remainder absolutely to the testator *Compton Charles Domvile*, and that Sir *Compton Domvile* had sold a portion of it to the value of 894*l.* The residue remained in his father's possession until his death in 1857, after which it was sold for 1,097*l.*

It also appeared that the testator, at the date of his will

will in 1847, "resided in a house in *Worcestershire* rented by him as tenant from year to year; he had resided there for about two years, and continued to reside there until he started for *Nice*. A few months before his death, he went to reside at *Nice* for the benefit of his health, in a furnished house which he rented, and there he died in *March*, 1852. At the time of his decease, he had no dwelling-house except that at *Nice*. All his plate (other than that which came to him under his grandfather's will) was deposited at the banking house of Messrs. *Coutts*, his bankers in *London*, and he had a quantity of wine, household furniture, linen and books packed up in cases and deposited at Messrs. *Tilbury's* warehouse in *London*."

1863.

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Domvile

v.

Taylor.

The questions for the opinion of the Court were:—

1. Who was entitled to the sum of 894*l.* 8*s.* 7*d.* which had been paid by the executors of Sir *Compton Domvile* to the Defendants?
2. Who was entitled to the plate deposited with the bankers of *Compton Charles Domvile*, and to the 1,087*l.* 10*s.* 6*d.* the produce of the sale of the plate bequeathed by his grandfather, and remaining in specie at the death of Sir *Compton Domvile*?
3. Who was entitled to the household furniture, linen and books deposited at Messrs. *Tilbury's* warehouse?

Mr. *Hobhouse* and Mr. *Martelli*, for the widow, argued that the property in question passed to the widow; that the plate was not limited to that in the testator's dwelling-house, but extended to all the plate in which the testator was in any way interested; that the family plate passed together with the produce of that which had been sold, for the tortious act of the father could not affect the dispositions of the son.

Secondly.

1863.
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 Domville  
 v.  
 Taylor.

Secondly. That if the property was not actually in the dwelling-house, still it passed, the words being merely descriptive of the things; *Shaftesbury v. Shaftesbury*(a); *Land v. Detaynes*(b); and see *Spencer v. Spencer*(c). They referred to *Lindley Murray*(d) to shew "that conjunctions very often unite sentences when they appear to unite only words," and that the present was an instance of distinct gifts, in distinct sentences, in which the qualification only affected the last.

**Mr. E. F. Smith**, for the executors. There are two bequests only, one of 500*l.* and then a distinct one commencing with "and." It is to be observed that the word "and" following the words "of the like nature" commences with a small "a," and not with a capital letter. This shews that the sentence runs on, that the latter is but one gift, and that the whole of it is restricted by the words "what shall be at my decease in or about my dwelling-house then occupied by me." Therefore only those articles so situate at his death passed. Again, only that part of the plate which was for "domestic use" passed; *Le Farrant v. Spencer*(e); and this excludes the family plate, which, in addition, could not be properly termed "my plate," as, at that time, it belonged to his father. The 894*l.* could only pass as money and not as "plate."

**Mr. Hobhouse** in reply.

**The Master of the Rolls.**

As to the 894*l.* there is not much difficulty. The wrongful act of the father could not alter the rights.

**The**

- (a) 2 *Vern.* 747.
- (b) 4 *Bro. C. C.* 536.
- (c) 21 *Beav.* 548.

- (d) *Tit. "Conjunctions"* (55th edit.)
- (e) 1 *Ves. sen.* 97.

*The Master of the Rolls.*

I have had some difficulty in coming to a satisfactory conclusion in this case. But, on the whole, I am of opinion, that I must read this will as if the testator had meant to make a division between these articles. I must read it thus:—"I give to my wife all my household furniture, plate," &c., "and other effects of the like nature," and put a stop there, and then as if he had continued, "I also give her all my wines," &c., "which shall, at my decease, be in or about any dwelling-house then occupied by me." The only mode in which I can explain the will is, that the testator meant two sentences.

Accordingly the bequest is to be read as if there were three gifts, first of the 500*l.*, the second of "all his household furniture, plate," &c., and the third of "all wines," &c. This carries all the plate, including that in his father's house, and the produce of that which had been sold, and that at the testator's bankers, and also the furniture, &c. at *Tilbury's*.

1863.

DOMVILLE

v.

TAYLOR.

June 2.

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NOTE.—Reg. Lib. 1863, A., fol. 1120.

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1863.

June 4, 5.

The word  
"survivor"  
cannot be con-  
strued as  
"others,"  
where the gift  
over is partly  
to persons  
whose interests  
are not given  
over.

A testator  
gave legacies  
to each of his  
four daughters  
for life, with  
remainder to  
their children;  
and he pro-  
vided, that if  
either of the  
daughters  
should die  
without chil-  
dren, her share  
should go over  
to the survivors  
of his sons and  
daughters.  
*Held,* that  
"survivors"  
could not be  
read "others,"  
in consequence  
of the gift over  
being to a dif-  
ferent class  
from those  
whose shares  
were to go  
over.

THE testator had two sons, *Henry* and *Peter*, and four daughters, *Mary Ann*, *Jane*, *Phæbe* and *Elizabeth*.

By his will he bequeathed 8,000*l.* to *Mary Ann* for life, with remainder to her issue. And he directed the residue arising from the sale and conversion of his real and personal estate to be divided into seven equal parts, and he gave two-sevenths to his son *Henry* absolutely, two-sevenths to his son *Peter* absolutely, one-seventh to trustees for his daughter *Jane* for life, with remainder to her children or issue, and similarly one-seventh each in trust for *Phæbe* and *Elizabeth* respectively for life, with remainder to their children.

The will contained the following clause:—

"And I do hereby declare it to be my will and mind, that in case any one or more of my said several daughters, *Jane*, *Phæbe*, *Elizabeth* and *Mary Anne* shall happen to depart this life, not having had any child of her or their body or respective bodies who shall live to attain the age of twenty-one years, or shall die under that age without leaving issue of his or her body living at the time of his or her decease, then and in every such case I do hereby order and direct, that the three several seventh parts or shares of the residue of the said moneys to arise as aforesaid and hereinbefore bequeathed to my said trustees, for the separate use of my daughters *Jane*, *Phæbe* and *Elizabeth*, and also the said sum of 8,000*l.* hereinbefore bequeathed to my

my said trustees for the benefit of my daughter *Mary Anne*, shall go to and be divided amongst the survivors of them my said sons and daughters, in such parts, shares and proportions, as the residue and remainder of the moneys arising from the sale of my said real and personal estate is hereinbefore by me given and bequeathed, and that the respective parts and shares of such surviving daughter or daughters therein shall immediately become vested in my said trustees," upon like trusts for their respective lives, and after their decease, respectively, for their respective issue, and payable, and with the like benefit of survivorship, and subject to the like powers, &c. &c. as their original sevenths.

1863.

De Garagnol v.

Liardet.

The testator died in 1829.

In 1862 *Jane* died without having been married, and her seventh share went over. Her two brothers and her sister *Jane* survived her, but *Mary Anne* had died in 1848 without having been married, and *Elizabeth* had died in 1860, leaving one child only, viz., the Plaintiff Madame *De Garagnol*.

The question submitted for the opinion of the Court, upon this special case, was as follows :—" Who, upon the death of the testator's daughter *Jane* without issue, became entitled, and in what proportions, to her one-seventh share of his residuary estate ? "

Mr. *Hobhouse* and Mr. *Surrage*, for the Plaintiff Madame *Garagnol*, argued that the word "survivors" ought to be construed "others," so that the Plaintiff would participate in the share of *Jane*. They argued that this construction was warranted by authority, and that it would prevent an intestacy, in the event of the last

1863.  
 DE GARAGNOL  
 v.  
 LIARDET.

survivor, if a daughter, dying without issue. They cited *Cole v. Sewell* (*a*); *Smith v. Osborne* (*b*); *Aiton v. Brooks* (*c*); *Eyre v. Marsden* (*d*).

Mr. Jones in the same interest.

Mr. J. Hinde Palmer and Mr. Rowcliffe, for the sons, argued that the word "survivors" must be construed strictly. *Leeming v. Sherratt* (*e*); *Wilmot v. Wilmot* (*f*); *Winterton v. Crawfurd* (*g*); *Holland v. Allsop* (*h*); *Greenwood v. Percy* (*i*).

Mr. Hobhouse in reply.

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#### *The Master of the Rolls.*

June 5.

On looking at the cases, I entertain no doubt that, in this instance, the word is to be construed strictly, and that it means survivors. There are many difficulties in all these cases, and if you adopt Sir Wm. Grant's suggestion, and read the word as the others of those before mentioned, it cannot be so read here, because the gift over is to a different class. If he had given shares to his children, and said "if any of them should die without issue at their deaths, then I give their shares to the survivors of the children and of A. B.," a perfect stranger, it is clear that, in that case, you could not read "survivors" as "others," for others is confined to the others of the class whose shares are to go over. Here are four daughters, and if their shares had been given over to the survivors of them, it would then have been

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|-----------------------------------------------------------------------------|-------------------------------------------|
| ( <i>a</i> ) 4 <i>Dru. &amp; War.</i> 1, and 2<br><i>H. of L. Cas.</i> 186. | ( <i>e</i> ) 2 <i>Hare</i> , 14.          |
| ( <i>b</i> ) 6 <i>H. of L. Cas.</i> 375.                                    | ( <i>f</i> ) 8 <i>Ves.</i> 10.            |
| ( <i>c</i> ) 7 <i>Sim.</i> 204.                                             | ( <i>g</i> ) 1 <i>Russ. &amp; M.</i> 407. |
| ( <i>d</i> ) 2 <i>Keen</i> , 564, and 4 <i>Myl.</i><br>& <i>Cr.</i> 231.    | ( <i>h</i> ) 29 <i>Beav.</i> 498.         |
|                                                                             | ( <i>i</i> ) 26 <i>Beav.</i> 572.         |

been possible to read "survivors" as "others," but if the shares are given over to the survivors, not of them but of the daughters and their brothers, that construction cannot be admitted. To do so, the gift over must be to the others of the particular class, on the failing of the issue of one of whom his share is given over, and is to take effect for the benefit of the others of the same class.

Even if the word had been written "others," I do not see how the brothers could have taken. If the testator had said, "I give the share of any daughter dying without leaving issue to the others of my sons and daughters," then others would not be a proper expression.

Where a person gives property in shares to three or four persons, and says, that on failure of issue of any one his share is to go over to the survivors, it may be read others; but if he says survivors of a different class, the word "survivors" must be read strictly.

I do not find any case where "survivors" has been read "others" when the gift over is to a separate and distinct class. I am of opinion that it is here given over to a separate and distinct class, and as much so as if it had been given to the survivor of the daughters and of the children of *A. B.* a stranger. I am of opinion that "survivors" in this will must be read strictly, and that *Jane's* share must be divided between her two brothers and *Phæbe*.

I think the share is divisible into five parts, that the sons will each take two-fifths and the surviving daughter will take the remaining fifth, but on the same trusts as her original share. That construction might possibly lead to an intestacy, but that is not so serious a consequence as altering the words of the will.

1863.



De GARAGNOL

v.

LIARDET.

1863.

*June 12.*  
 A covenant, by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does.

Such a covenant to settle does not bind property over which a wife is deprived of the power of disposition.

Covenant by husband and wife to settle all after-acquired property, "not being already settled for her separate use:"

*Held, not to bind property subsequently bequeathed to the wife for her separate use.*

### COVENTRY v. COVENTRY.

UPON the marriage of Mr. *Coventry* with Miss *Catharine Seton*, in 1842, a settlement was executed, by which some of the lady's property was settled in trust for her separate use, without power of anticipation, during the coverture, and, subject to the life interests of their parents, for the children of the marriage. The deed contained the following agreement to settle the after-acquired property of the wife:—

"And it is hereby further agreed and declared, and they the said *Catharine Seton* and *John Coventry* do hereby, for themselves respectively and their respective heirs, executors and administrators, covenant and declare, promise and agree, with and to the said *John Mort Wakefield* and *George Leroux Wilson*, their executors, administrators and assigns, that in case any estate, real or personal, shall, at any time or times after the solemnization of the said intended marriage, descend or come to, or devolve upon, or be given, devised or bequeathed to, or in trust for, her the said *Catharine Seton*, and not being already settled for her separate use, they the said *Catharine Seton* and *John Coventry* respectively," &c., will at the request of the said *John Mort Wakefield* and *George Leroux Wilson*, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time, "make, do and execute, or cause and procure to be made, done and executed, all and every such lawful and reasonable acts, deeds, matters and things as by" the trustees shall be required "for conveying, assigning and assuring all such future or additional

additional fortune, or other real or personal estate of the said *Catharine Seton* unto" the trustees, upon the trusts hereinbefore expressed.

1863.

  
COVENTRY  
v.  
COVENTRY.

The Rev. *E. Waller* died in 1859, having bequeathed two legacies of 1,000*l.* and 2,000*l.*, and (subject to the life interest therein of his two sisters) the moiety of his residuary estate to Mrs. *Coventry*; and he declared that these bequests should be for her separate use independent of her husband.

By a deed in 1860, Mrs. *Coventry* had assigned this property to trustees, in trust "for her sole and separate use," independent of Mr. *Coventry*.

This bill was filed by Mrs. *Coventry* against her husband and children, praying a declaration that the bequests were not included in, or subject to, the trusts of the settlement of 1842.

Mr. *Bristowe*, for the Plaintiff, argued, that this property was excluded from the operation of the covenant, it being already settled to Mrs. *Coventry's* separate use.

He cited *Willoughby v. Lord Middleton* (*a*); *Ramsden v. Smith* (*b*); *Brooks v. Keith* (*c*); *Thornton v. Bright* (*d*); and said that this case was distinguishable from *Milford v. Peile* (*e*).

Mr. *Jolliffe*, for the trustees and the husband.

Mr. *C. Chapman Barber*, for the children. This property is bound by the settlement; the covenant is on the

- (*a*) 2 *John. & Hem.* 344.
- (*b*) 2 *Drew.* 298.
- (*c*) 1 *Drew. & Sm.* 462.

- (*d*) 2 *Myl. & Cr.* 230.
- (*e*) 17 *Beav.* 602.

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the part both of the husband and wife, and, therefore, binds both. It is argued, that the words "not being already settled for her separate use" are in the nature of an exception out of the covenant; but that is not the proper construction. These words are descriptive of the property "already settled" (*i. e.*, by the settlement itself) to her separate use.

Secondly, the deed of 1860 made it subject to the settlement, by placing it in her own power.

The Master of the Rolls.

I am of opinion that this property is not included in the settlement, and that if I were to adopt Mr. C. Barber's argument it would render the exception ineffectual. It is quite settled that a covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but that if the covenant be by both then it does bind it. Again, this Court can only settle property over which the wife has a power of disposition, for if it is settled by an instrument which prohibits anticipation, the covenant to settle would be inoperative. Supposing the 1,000*l.* had been settled on this lady for life without power of anticipation, with remainder to her children, no power of hers could alter the trusts of the will or bring the property within the trusts of this settlement, for the donor has said, that it shall not come within the covenant. I think that the words "and not being already settled for her separate use" cannot mean such a settlement as this Court says is a proper settlement, namely, on the parents for life, with remainder to their children: that cannot be the meaning.

I agree

I agree that these words are part of the description of the property to be bound by the covenant in this way:— the agreement is to settle all the property which, after the marriage, shall devolve upon her, except that not “already settled for her separate use.”

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v.
COVENTRY.

I am of opinion that property subsequently given her for her separate use, so that she has the absolute controul over it and her husband has none, is not to be included in this settlement. That is the only way in which the covenant can be carried into execution, and that, in my opinion, is the true construction.

I do not think that what she has done since the testator's death makes any difference. She has thought fit to place the property in the hands of trustees of her own, to enable her to deal with it, and this is a mere mode to carry into effect the will of the testator.

BULL v. HUTCHENS.

June 8.

THE Plaintiff put some leasehold property up for sale by auction, and the Defendant on the 11th of June, 1862, became the purchaser for 378*l.* The sale was made subject to certain conditions. The 6th condition of sale provided as follows:—

“No purchaser shall be entitled to call for the production of, or investigate or make any objection or requisition

By the conditions of sale relating to leaseholds, it was stipulated, that the production of the last receipt should be conclusive evidence that all the covenants had been performed. Held,

that the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises.

A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into the validity of the Plaintiff's claim.

A registered order of the Court of Probate does not create a charge on lands.

1863.

BULL
v.

HUTCHENS.

sition respecting the title, prior to or the right to grant the said leases and underleases respectively, *and the production of a receipt for the last payment of rent accrued previously to the completion of any purchase shall be conclusive evidence that all the covenants and agreements in the lease or underleases, under which the property included in such purchase shall be held, have been performed and observed up to the completion of such purchase.* The nature of the covenants and conditions may be ascertained from copies thereof which will be produced at the sale, and any purchaser shall be deemed to have full notice thereof."

Two objections were taken to the title, the first was as follows :—" The original lease under which the premises are holden contains the usual covenant to keep the same in repair, and a proviso for re-entry in default. The purchaser has ascertained that the premises are in a ruinous state, consequently it is competent for the lessor to re-enter at any time, as the breach is continuing. The premises must be reinstated, and a waiver of the cause of forfeiture procured from the lessor or his representatives, before the vendor can be in a position to give a title to the property. It has also been ascertained that the garden wall, separating the garden of this house from that adjoining, has been pulled or has fallen down. This must be reinstated and a waiver obtained, as it is also a breach of the covenant to repair."

As to this objection, the vendor proposed to remove it by the production of the last receipt for the rent under the 6th condition of sale.

The second objection arose under these circumstances :—By an order of the Court of Probate, made on the 5th of February, 1861, it was ordered that the

Plaintiff

Plaintiff should pay one of the Defendants an annuity of 25*l.* during her life. This order was duly registered at the office of the senior master of the Common Pleas under the 1 & 2 Vict. c. 110. The annuity was afterwards assigned to Mr. *Pratt*, who on the 12th of September, 1862, filed his bill to have it declared that the annuity was a charge on the leasehold property of the Plaintiff *Bull*; but a demurrer was allowed by the Vice-Chancellor *Stuart* on the 19th of November, 1862 (*Pratt v. Bull*, 4 *Giffard*, 117), which was affirmed by Lord *Westbury* on the 23rd of January, 1863 (*Pratt v. Bull*, 1 *De Gex, J. & Smith*, 141). The suit of *Pratt v. Bull* was registered as a *lis pendens*.

This bill was filed for the specific performance of the contract on the 20th of September, 1862.

Mr. Baggallay and **Mr. Hardy** for the Plaintiff.

Mr. Selwyn and **Mr. Kay** for the Defendant.

Nott v. Riccard (a); *Pyrke v. Waddingham* (b); *Wells v. Maxwell* (c) were cited.

The Master of the Rolls.

This is a bill for the specific performance of a contract, which is resisted on two grounds. The first is, that there has been a forfeiture of the lease by reason of the property being out of repair. This is met by the 6th condition of sale, which provides that the production of a receipt, for the last payment of rent accrued previous to the completion of any purchase, shall be conclusive evidence that all the covenants have been performed up to

(a) 22 *Beav.* 311.
(b) 10 *Hare*, 1.

(c) 32 *Beav.* 408.

1863.
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**BULL**  
v.  
**HUTCHENS.**

1863.

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BULL  
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HUTCHENS.

to the completion of such purchase: therefore the purchaser knew perfectly well that the production of the last receipt would be a waiver, on his part, of any objection as to the state of the repairs of the property: consequently, when the purchase is completed, the receipt for the last rent must be produced and that will remove this objection.

The more important point is that which was raised in *Pratt v. Bull*, and was, whether a registered order of the Court of Probate was a charge on this property. At this moment it is established, by the decision of Vice-Chancellor *Stuart* and the Lord Chancellor, that it creates no such charge. It is therefore clear, that the Plaintiff is entitled to a specific performance of the contract, it being admitted that the title is accepted except on these points.

The next question is, whether the Plaintiff is entitled to the costs of the suit. It has been argued, first, that the *lis pendens* creates an incumbrance, and, secondly, that the claim of *Pratt* was of such a nature, that if the Vice-Chancellor and the Lord Chancellor had not determined the question, this Court would not compel the specific performance of the contract. I am of opinion that the *lis pendens* is merely notice of some claim, made in respect of the property which is the subject of the suit, but that it does not, of itself, create an incumbrance, apart from the equity on which the litigation is founded. If it were otherwise, a *lis pendens* having nothing to do with the matter might create an incumbrance. It was notice of the existence of a suit in chancery, and required all persons dealing with the property to look at the proceedings to see whether it did affect the property or not. Here the *lis pendens* was no incumbrance if *Pratt* had no right against the property,

property, for it depended on the validity of his claim, for if his claim were idle, it could not create any incumbrance on the property. A man might file a bill claiming property, alleging that sixty years ago his ancestor was seised in fee, and that although he had sold the property, yet he had no right to do so. The Plaintiff might register this as a *lis pendens*; but could anybody say, that this was an incumbrance on the property, or a reason why a purchaser should not complete his purchase? All that the registration of a *lis pendens* does, is to require persons to look into the claims of the Plaintiff who registers it.

1863.  
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BULL
v.
HUTCHINS.

I think the case before Vice-Chancellor *Turner* of *Pyrke v. Waddingham* (a) has been carried, in the argument before me, much further than he intended. I have repeatedly expressed my opinion, that it is the duty of this Court to decide questions of law which arise in determining the validity of titles. Lord *Eldon* repeatedly determined questions of law and compelled purchasers to take a title depending upon them. It is difficult to draw the line and to lay down any rule as to the extent of uncertainty prevailing in the mind of the Court, which shall induce it to refuse specific performance of a contract, on the ground of an objection to the title, which the Court thinks, if the persons principally interested in supporting it had been before the Court, could not have been sustained. In any case it is an imputation on the Court to say, that it is incompetent to declare the law on a point fully and adversely argued before it. The Vice-Chancellor did not, I think, intend his observations to extend so far as to lay down, that wherever there was a reasonable doubt as to the validity of an objection, the purchasers should not be compelled to accept the title.

When

(a) 10 *Hare*, 1.

1863.

BULL
v.

HUTCHENS.

When I come to the nature of the objection, it appears to me to be an untenable one. It amounts to this:— Lord *Campbell's* Act said that an order of the Superior Courts should be an incumbrance, and the question was, whether that was to be prospective and apply to the orders of all Superior Courts which might afterwards be created. If the legislature had intended that such an order should be an incumbrance on lands, nothing was easier than to embody such a clause in the act. But the act establishing the Court of Probate is silent on this subject. It is now made clear by the decisions of the Vice-Chancellor and the Lord Chancellor.

It follows, as a general rule, that where a decree is made the costs follows the event. Here the case is much stronger, for the decision of the Lord Chancellor was in *January*, 1863, and yet, after that, the Defendant has required the suit to be brought to a hearing.

I am of opinion, that the Plaintiff is entitled to the specific performance and to the costs.

1863.

Re FORD (a).

June 12.

ON the 26th of *February*, 1846, the Petitioner *Elizabeth Furnivall* (then *Elizabeth Hedgcock*) intermarried with *Thomas Furnivall*, who, two days afterwards and ever since, had deserted her. She had not received from him any pecuniary or other assistance whatsoever, but had been, until the 29th of *April*, 1862, wholly supported by her sister, the co-Petitioner, *Sarah Anne Hedgcock*, otherwise *Hamilton*.

The testator, *William Ford*, died in 1848, having by his will and codicil, dated respectively in 1838 and 1843, bequeathed an annuity of 100*l.* to *Elizabeth Hedgcock* for life, which (in the event of her surviving her sister) was to be increased to 250*l.* a year.

The trustee of the will, upon ascertaining that she was a married woman, declined to pay the annuity to her, without having the receipt of her husband. She refused to say who her husband was, and the trustee invested the annuity in Consols, and accumulated it, and it now amounted to 1,315*l.* 12*s.* 10*d.* Stock.

In 1861, *Elizabeth Furnivall* instituted a suit in her Majesty's Court of Divorce and Matrimonial Causes for a judicial separation from *Thomas Furnivall*; and on the 31st of *January*, 1862, the Judge Ordinary pronounced and declared a judicial separation between them, by reason of his desertion without reasonable excuse.

A husband deserted his wife immediately after her marriage in 1846, and she was supported by her sister. In 1848 an annuity was bequeathed to her for her life, which the trustee accumulated until 1862, when the wife obtained a decree for a judicial separation. In 1863, the Court, on the petition of the wife and her sister, ordered the whole accumulations, amounting to 1,315*l.* Stock, to be paid over to the sister to the exclusion altogether of the husband.

After

(a) *Ex relatione.*

1863.

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Re  
FORD.

After this decree, the trustee paid the annuity to Mrs. *Furnivall* as it became due, but he paid the accumulations into Court under the Trustee Relief Act.

This petition was now presented by *Elizabeth Furnivall* and her sister *Sarah Ann Hedcock*, praying "that the 1,315*l.* 12*s.* 10*d.* Bank £3 per Cent. Annuities, or a competent part thereof, might be transferred to *Sarah Anne Hedcock*, otherwise *Hamilton*, for her own use and benefit, or that the same Bank Annuities, or the residue thereof (as the case might be), might be settled and secured for the sole and separate use of Mrs. *Furnivall*, or otherwise for her benefit, excluding *Thomas Furnivall*, as this Honorable Court should think fit."

Mr. *Selwyn* and Mr. *Schomberg*, in support of the petition, relied on *Guy v. Pearkes* (*a*) ; *Wells v. Malbon* (*b*) ; and see *Atherton v. Nowell* (*c*) ; *Coster v. Coster* (*d*).

Mr. *Fischer*, for *Thomas Furnivall*, argued, that there was no evidence that any misconduct on his part caused the separation. That there was, therefore, no ground for depriving the husband of his marital right over the arrears of the annuity. That the Court never settled the whole of a fund when the wife was already amply provided for, as in this case, by an annuity for life. In *Coster v. Coster* (*e*), the husband had misconducted himself, still the Court only settled three-fourths of the fund. In *Re Erskine* (*f*), the fund was paid to the husband.

Again,

(*a*) 18 *Ves.* 196.

(*b*) 31 *Beav.* 48.

(*c*) 1 *Cox*, 229.

(*d*) 1 *Keen*, 199.

(*e*) 9 *Sim.* 597.

(*f*) 1 *Kay & J.* 302.

Again, the wife has no equity to a settlement out of a life interest; *Tidd v. Lister* (a); *Re Duffy's Trust* (b).

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That the sister's claim for a voluntary expenditure upon her sister could not be supported as a lien on the fund. If, however, the Court thought that anything ought to be settled, it ought not to exceed one-half of the fund, and that the other half ought to be paid to the husband. He also cited *Carter v. Taggart* (c); *Barrow v. Barrow* (d); 20 & 21 Vict. c. 85, ss. 16, 25.

The MASTER of the ROLLS.

So far as the case depends on me, the husband cannot be permitted to receive any part of the fund. When a man deserts his wife two days after his marriage, he cannot be expected to be listened to when he says, that the separation was voluntary. In such a case it must be assumed that the fault was the husband's. The claim of the sister depends upon the bounty of the wife, who asks that the fund may be paid to her sister; I shall, therefore, make the order as prayed.

(a) 10 *Hare*, 140, and 3 *De Gex, M. & G.* 857.

(b) 28 *Beav.* 386.

(c) 5 *De Gex & Sm.* 49, and 1 *De G., M. & G.* 286.

(d) 4 *Kay & J.* 409.

NOTE.—See the cases, 29 *Beav.* 582, n.

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The costs of suit were ordered to be taxed as between solicitor and client, and paid out of the trust funds. It was held, that the costs of a consultation with Queen's Counsel, as to the frame of the bill, ought to be allowed, notwithstanding, by his advice, a part of the relief sought by the draft bill was abandoned, and never became the subject of the suit.

FORSTER v. DAVIES.

THIS was a petition to review the taxation of a bill of costs.

It appeared that differences had existed between Mr. and Mrs. *Forster*, on the one side, and the trustees of their marriage settlement on the other, and the latter having declined to retire, instructions were given to Junior Counsel to settle a bill to have them removed. Counsel thought that the suit ought also to seek for the reformation of the settlement, and he so advised and settled the bill accordingly. The Plaintiff's solicitor, feeling great difficulties, deemed it expedient and necessary that the bill should be settled in consultation with Mr. *B.*, a Queen's Counsel, cognizant generally with the circumstances of the case. At the request of the Junior Counsel, the bill was laid before Mr. *B.* in consultation, who advised that it would not be expedient to raise the question of rectification of the settlement. The bill was settled accordingly omitting that part. At the hearing, the Plaintiff Mrs. *Forster* did not succeed in removing the trustees, and it was ordered that the costs of all parties should be taxed, as between solicitor and client, and paid out of the trust funds.

In the taxation, the Taxing Master disallowed items to the amount of about fifteen guineas, which related to the consultation with Queen's Counsel, thinking that those costs were incurred in a different matter from that adjudicated upon in this suit.

Mr.

Mr. *Selwyn* and Mr. *Bovill* for the Plaintiff, in support of the petition, referred to *The Downing College Case (a)*, where three counsel had been allowed.

Mr. *Hardy* for Mr. *Forster*, the Plaintiff's husband.

Mr. *Baggallay* and Mr. *Gardener* for the trustees.

The Master of the Rolls.

This is a matter of importance, and I shall therefore take a little time to consider it, but my present impression is, that these costs ought to be allowed. I do not think that the fact that the result of the consultation with the Queen's Counsel was, that the suit was restricted to a particular point, and that, therefore, his advice was taken upon a point, which was not ultimately embraced in this suit, can properly be taken into consideration upon the question of whether the costs ought to be allowed or not.

To illustrate the case, I remember, shortly after I had the honor of being made a Queen's Counsel, settling a bill in consultation, upon which there was a question respecting the specific performance of an agreement for a partition. It was obvious that there was a very considerable inequality in the division, and I suggested, upon the facts laid before me, that, in addition, it should be stated, that although there was much inequality in the division, still that there was in addition a difficult question of right, which was compromised between two brothers, which constituted a family arrangement, upon which the agreement might be supported. That advice was adopted, and the suit was extended in consequence. But suppose the bill had been originally so framed, and that I had been of opinion that the partition

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(a) 3 *Myl. & Cr.* 474.

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tition could not be supported as a family arrangement, and that I had suggested that the passages relating to that portion of case should be struck out, could any reasonable difference be drawn, upon a taxation, between the result of the two pieces of advice? Upon the facts of the case, Queen's Counsel in one instance suggests an addition to the bill, and in the other case, he suggests a restriction of the bill. It is obvious that if the costs ought to be allowed in the one case, they ought to be allowed in the other; if not, you would have the most technical points argued in every such case, as to whether the bill was or not in conformity with the advice given.

Suppose that, after the consultation with Queen's Counsel, his advice had not been followed, but the parties had determined not to restrict this suit, would not the expense of obtaining his advice be properly allowed as costs between solicitor and client? The way in which it strikes me is this: Supposing *A. B.* determines to institute a suit, he applies to Mr. *Rogers*, through his solicitor, to frame a bill for him. Mr. *Rogers* says, I think this is a matter of considerable difficulty and request your client to let me have a consultation with Mr. *Bacon*, for the purpose of seeing whether this is right or not. The client assents to that, and thereupon the suit is framed accordingly. I do not care what the result of the suit is, that is of no consequence, but the solicitor is entitled to have his costs of the suit, as between solicitor and client against his client. The expense of procuring the advice of Mr. *Bacon* is clearly part of those costs. It is obvious they are not charges and expenses which trustees and executors are sometimes entitled to in the proper sense of the term, as distinguished from the costs of the suit. If they are any costs at all which the client is bound to pay, they are costs of the suit in the proper and technical sense of the

the term, and costs of the suit are distinguished from "charges and expenses" which have only remotely and collaterally relation to the proceedings in the suit.

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It is always to be borne in mind that this is not a question as to costs between party and party, in which case, these costs would not be allowed, but whether the term "costs of the suit as between solicitor and client" does not mean such costs of the suit as the client would have to pay to his solicitor? I think that these are costs which the client would have to pay to his solicitor, under the technical term costs of the suit, and that as such they come within the order.

It is no doubt a matter of considerable importance, because in my experience it has been the practice of draftsmen, in cases of difficulty, to take the opinion of the leading counsel as to how they should frame the suit. I remember, in the case of *Trevor v. Trevor* (*a*), having a consultation with Mr. Jacob as to the mode in which the bill should be framed, and in consequence of his advice, the bill was framed so as to take the opinion of the Court on the construction of a will, on the Master's report instead of on the original hearing. I apprehend that the expenses of procuring that advice were properly costs of the suit, and would have been allowed in a taxation as between solicitor and client.

My present impression is, although I wish to consider the matter a little further, that these are costs which ought properly to be allowed under an order directing payment of the costs of the suit as between solicitor and client.

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(*a*) 1 H. of L. Cas. 239.

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The further consideration I have given to this subject has confirmed me in the view I took of it on the hearing of the petition. I am of opinion that the costs incurred in the consultation with the Queen's Counsel, and incidental to his settling the bill, are proper to be allowed in the taxation of the costs of the suit as between solicitor and client, and that this is in no degree affected by the circumstance, that the bill, as originally prepared, sought additional relief, which, on the advice of the Queen's Counsel, was omitted, and formed no part of the suit as actually constituted.

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**PHILLIPSON v. KERRY.**

June 9, 20.

If a voluntary deed fail to carry into effect the intentions of the parties, it cannot be reformed, except with the consent of the donor.

Voluntary deed set aside after the deaths both of donor and donee.

THIS suit was instituted by *Charles G. W. Phillipson*, the executor and the legatee of Miss *Courtail*, against the executors of his uncle *Charles Burton Phillipson*, to set aside a deed of gift dated the 7th of January, 1857, from Miss *Courtail* in favor of *Charles Burton Phillipson*.

**Mr. Selwyn and Mr. Kay for the Plaintiff.**

**Mr. Baggallay and Mr. Bevir for Mr. Kerry.**

**Mr. G. L. Russell for the other executor.**

**Mr. Selwyn in reply.**

*Toker v. Toker (a)*, was cited.

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*The*

(a) 31 *Beav.* 629.

*The Master of the Rolls.*

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*PHILLIPSON**v.**KERRY.**June 20.*

This is a suit to set aside a voluntary deed executed by *Elizabeth Sophia Courtail*, on the ground that the nature and effect thereof were not properly explained to her when she executed it.

In the year 1851, a sum of 4,275*l. 4s. 9d.* £3 per Cent. Consols, being the residue of the estate of *Isabella Susanna Frances Albert*, was transferred into the name of the Accountant-General, the trusts of which were to pay the dividends thereof to *Elizabeth Sophia Courtail* for her life, and after her death, to be divided amongst her children, and in default of children, as she should by deed or will appoint, and in default of appointment, to her next of kin.

At this time she was unmarried and about forty years old: at this time she was also residing with Mrs. *Mary Burton Phillipson*, and she continued to do so until the death of that lady, after which she resided with *Charles Burton Phillipson*, the son of her friend. The instrument complained of bears date the 7th of *January*, 1857, it purports to be and is a deed of gift of all the sums of stock above mentioned to *Charles Burton Phillipson*. The mode by which it was effected was this:—She executed two deeds-poll of that date; by the first she exercised the power of appointment given to her by the will of *Susanna Frances Albert* in favor of herself. The second deed, which is that complained of, after reciting that, by virtue of the will of Mrs. *Albert* and the appointment, Miss *Courtail* was entitled for life to the residuary estate and to it absolutely in case she should die without leaving any child, and that the residue consisted of the 4,275*l. 4s. 9d.* Consols in Court, proceeded in the following terms:—

“ Now know ye and these presents witness, that the  
said

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said *Elizabeth Sophia Courtail* doth hereby give and grant the said sum of 4,275*l.* 4*s.* 9*d.* £3 per Cent. Consolidated Bank Annuities, so standing in the name of the said Accountant-General of the High Court of Chancery as aforesaid and absolutely appointed to the said *Elizabeth Sophia Courtail* under the deed of appointment bearing even date herewith, to *Charles Burton Phillipson*, of 8, *Euston Place, New Road*, in the county of *Middlesex*, gentleman, his executors and administrators, for his and their own absolute use and benefit."

After the execution of this deed, Miss *Courtail* continued to reside with *Charles Burton Phillipson* and his family until his death, which took place on the 26th July, 1861. Shortly after this, Miss *Courtail* went to reside with Mr. *Phillipson's* widow, she then made a will in favor of the Plaintiff *Charles G. W. Phillipson*, and she gave instructions to Messrs. *Lovell & Co.* to file a bill to set aside the deed in question, and she died on the day on which it was filed, viz., the 17th of November, 1862. She received the dividends on the stock up to the date of her decease. The present bill was filed by the Plaintiff, as her legal personal representative.

The question is, whether this deed of gift of the 7th January, 1857, can stand. There is this singularity in this case, which I do not remember to have met with in any of the numerous cases which have come before me on this subject: it is, that not merely the donor but the donee also is dead, and that consequently the account of the transaction given by each of them is wanting. I think, however, that the death of Miss *Courtail* cannot, in the circumstances of this case, affect the decision of this Court. It is, no doubt, a matter of importance, and one which has great weight with the

Court,

Court, whenever it appears that the donor has continued, throughout her life, cognizant of what she has done, and has evinced no regret for the act she has done, or expressed any desire to disturb it. But here the evidence is distinct, that this was not the case with Miss *Courtail*, and that, in *October* last, she complained of the deed she had executed, and in *November*, 1862, took steps to annul it. I think, therefore, that I am compelled to regard this matter in the same manner that I should have done if she was herself the Plaintiff seeking to avoid the transaction.

If I am right in this, then the ordinary rules which apply to transactions of this description must be applied to this case, and the burthen of proof to sustain the validity of the deed rests on those who seek to maintain it. There is not, I think, in this case any proof of undue influence, in the ordinary sense in which that term is used. It is true that Mr. *Charles Burton Phillipson* and his family were strangers in blood to Miss *Courtail*; but she had long resided with them, and there is evidence that she was desirous to exclude her own near relations from any benefit to be derived from her inheritance. I think also, on the evidence, that the first motion in this matter proceeded from herself. It is true that she did not apply to the gentleman, who had acted as her solicitor in the preparation of a will she had made some years before, and which was made in favour of the Plaintiff, then a boy of eleven years of age; but on the evidence of Mr. *Kerry*, which I see no reason to doubt, she voluntarily applied to him to prepare the instrument in dispute. The only question therefore is, whether the deed fully expresses the nature of the arrangement she wished to make, and whether its full purport and effect were clearly and distinctly made known to her. All this rests on the evidence of Mr.

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*Kerry* alone, which, as I have already stated, I see no reason to doubt, and it is on the consideration of this evidence that the validity of this deed must rest.

It happens that Mr. *Kerry* is a Defendant, but this is merely accidental. *Charles Burton Phillipson* made his will on the 8th of *April*, 1859, and appointed Mr. *Kerry* one of his executors, and it is in this character only that he is made a Defendant.

The account he gives of the transaction is contained in paragraphs 16 to 23 of his answer and is in these words :—"On the 22nd day of *December*, 1856, I received from *Elizabeth Sophia Courtail* a letter dated the previous day, which was as follows :—

" Dear Sir,—Will you oblige Mrs. *Phillipson* and me with a visit (professional) to-morrow at two or three o'clock; but if you are engaged we must wait until *Tuesday*, at the same hour mentioned above. We should prefer to-morrow (*Monday*) as matters of business should always be arranged with promptitude."

" 17. I accordingly, on the 22nd day of *December*, 1856, called upon *Elizabeth Sophia Courtail* at No. 8, *Euston Place, Euston Road*, and had a long interview with her, at which *Mary Burton Phillipson* and the wife of *Charles Burton Phillipson* were also present. At such interview, *Elizabeth Sophia Courtail* expressed to me, verbally, her desire to execute, in favour of *Charles Burton Phillipson*, a deed of gift of the sum of 4,275*l. 4s. 9d.* £3 per Cent. Consolidated Bank Annuities."

" 18. I thereupon prepared the draft for the necessary deed of gift by way of appointment, for the purpose of vesting the said sum of stock in *Charles Burton Phillipson*, and on the following 26th day of *December*, 1856, attended *Elizabeth Sophia Courtail* therewith at

No. 8,

No. 8, *Euston Place*, and fully explained to her the nature of the instrument which she was about to execute. I pointed out to her, that by such deed, she would part with her property, and I asked her to let me insert in such deed a power of revocation, but she refused to do so and stated, that she had perfect confidence in *Charles Burton Phillipson*, and that she should not wish to alter the disposition of the sum of Bank Annuities intended to be thereby made."

"19. I clearly understood the object of the said *Elizabeth Sophia Courtail*, in wishing to execute such deed of gift in favour of *Charles Burton Phillipson* to be, that he should have the said sum of Bank Annuities thereby disposed of, without having to pay any legacy or succession duty thereon, and that she had full confidence in *Charles Burton Phillipson*, that he would allow her to receive, until her death, the dividends of the said annuities, notwithstanding that such annuities had been disposed of in his favour."

"20. At the last-mentioned interview, *Elizabeth Sophia Courtail* fully and absolutely approved of the said draft deed of appointment in favour of *Charles Burton Phillipson*, and refused to allow the same to be altered, as suggested by me, and the same was afterwards engrossed; but it was never executed by her, for the reason that, after such engrossment had been made, it occurred to me, that the object and desire of *Elizabeth Sophia Courtail* would be better and more properly effected by her first executing a deed of appointment of the said Bank Annuities in her own favour, and then a deed of gift of the same Bank Annuities in favour of *Charles Burton Phillipson*."

"21. In accordance with such view and in consequence thereof, I, on the 27th day of *December*, 1856, waited on *Elizabeth Sophia Courtail*, at No. 8, *Euston Place*

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*Place aforesaid, and explained the matter to her, and she thereupon, then and there, verbally instructed me to prepare such deeds as I thought would be necessary and proper to carry out her wish to vest the said Bank Annuities absolutely in the said *Charles Burton Phillipson* as aforesaid."*

"22. I accordingly prepared the drafts of such two deeds, namely, a deed of appointment of the said Bank Annuities to herself, *Elizabeth Sophia Courtail*, and a deed of gift of the same to *Charles Burton Phillipson*, which were afterwards engrossed; and on the 6th day of January, 1857, I waited upon *Elizabeth Sophia Courtail*, at No. 8, *Euston Place*, aforesaid, with such engrossments, and she then and there executed the same in my presence, the deed of gift in favour of *Charles Burton Phillipson* being executed after the execution of the deed of appointment in her own favour."

"23. Before the execution of the said deed of gift, I, at the interview lastly hereinbefore mentioned, asked *Elizabeth Sophia Courtail* if she knew what she was about in executing that deed. She replied 'Yes.' I thereupon asked her if she knew that she was parting with all power over the property comprised in it. She said 'Yes.' I then questioned her as to whether the deed was her own voluntary act, and she answered 'Quite so.' At the time of putting these questions to her, I wrote them and her replies thereto, in pencil, on the fly-leaf of the draft of the said deed of gift, where the same still are, and to which I refer."

Some important considerations arise on this statement. I pass by the consideration whether, by the instrument first proposed, the life interest of Miss *Courtail* would have been disposed of, but the end of  
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the 18th and 19th paragraphs contain a very material statement, shewing that she considered that she should be able, during the rest of her life, to enjoy the dividends on the stock, but that her doing so would depend on the honor and integrity of *Charles Burton Phillipson*. If so, it was a part of the arrangement that he was to allow her to have the dividends on the stock during her life, and this circumstance is confirmed by the fact, that she did so receive them, and also by the evidence of his widow, but this part of the arrangement is not only not expressed in the deed, but, in various events which might have occurred, it would have been impossible to secure the receipt of them to her. If *Charles Burton Phillipson* had become bankrupt, the whole of the stock would, if the deed were valid, have passed to his assignees. If *Charles Burton Phillipson* died before her in insolvent circumstances, the stock would have been assets of his for the payment of his creditors, and even if neither of the events occurred, but *Charles Burton Phillipson* had died intestate, the whole would have passed away from her; nay, even if he made a will, unless he provided for her right to receive the dividends on the stock, she could take nothing, unless by the permission of those who took the fund, and if they were infants, such permission could not be given. I do not find, on Mr. *Kerry's* evidence, that any part of this most material result of the deed was pointed out or explained to her. On the contrary, she seems to have been content to allow her receipt of the dividends to rest on Mr. *Phillipson's* honor; but it was the duty of Mr. *Kerry* to explain to her, that circumstances might arise which would preclude Mr. *Phillipson* from so acting, however strongly he might be inclined to do so.

The events which have actually occurred point out, strongly, how important it was that this explanation should

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should have been given to her. *Charles Burton Phillipson* made his will on the 8th April, 1859, upwards of two years after this deed of gift. In it, he made no mention of this stock, but simply disposes of all his property in favour of his wife and children, and he died on the 26th July, 1861, leaving Miss *Courtail* surviving him. If this deed was good, she was then at the mercy of Mrs. *Phillipson*, and could only receive the dividends on the stock at her will and pleasure. In November, 1862, Miss *Courtail* died, not at an advanced age, being then only fifty-one years of age. Assume, for the purpose of testing this matter, that Mrs. *Phillipson* had died in that month, leaving Miss *Courtail* her survivor; Miss *Courtail* would, in that event, have been left destitute. The infant children of *Charles Burton Phillipson* could have had no power to permit Miss *Courtail* to receive the dividends, nor could their guardian have permitted her to do so. These dividends were the sole source of income she possessed, and she would, therefore, in that event, have become literally penniless, and could only have been maintained by private generosity or parochial relief.

Was this explained to her? I think it clear that it was not. Was this result contemplated by her? I am equally clear that it was not. If there was an honorable understanding between her and Mr. *Charles Burton Phillipson*, that she was to receive the dividends during her life, it was his duty to fulfil the understanding on his part, as far as it was in his power to do so. But he has not done so, for his will is silent on the subject. Could he, or can those who represent him, insist on the validity of the deed, without performing the honorable engagement, which, though not expressed, formed a part of the agreement. I am of opinion that he could not, and that they cannot.

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It is not sufficient to say, that he was younger than Miss *Courtail*, and that all parties anticipated that he would survive her. In a matter so uncertain as human life, this contingency ought to have been provided for.

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It is said, that the deeds were put in this form in order to avoid the payment of succession duty, but there is no excuse, or indeed any explanation, for the omission of so material a provision, the want of which might have reduced this lady to beggary. It would have been easy to provide against the contingency. Mr. *Phillipson* might have covenanted to pay this lady an annuity for her life, equal in amount to the dividends which she received. Various modes might have been adopted by which the income, or an equivalent for the income, might have been preserved for her, without incurring the liability to pay either legacy or succession duty on her death; but none of these were done; and yet it is obvious, that this was intended. Not only does Mr. *Kerry* say so in the paragraph 19 of his answer, which I have read, but the fact is confirmed by the receipt of the dividends by this lady during Mr. *Phillipson's* life, and it is still more strongly confirmed by the fact, that on his death, Mr. *Kerry* treated his interest in this stock as merely rever-sionary, and proved it accordingly, estimating the value of his estate on that principle.

If this had been a transaction where stock had been sold for a valuable consideration, then, possibly, the instrument might have been reformed, and so modified and rectified, on proof of the intentions of the parties, as to have carried these intentions into effect; but in a voluntary gift, this is impossible. The instrument is either good or bad; it cannot be modified to suit former intentions,

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intentions, unless the donor consent to make a new and distinct instrument.

Throughout the evidence, I am unable to see any intention, on the part of this lady, to leave herself wholly destitute, notwithstanding the favourable disposition towards her of the donee of her stock. I see no evidence of any belief, on the part of the donee, that she was to be so left; on the contrary, I see an intention, on both sides, that something should have been done which was not done, and which cannot now be done.

I am of opinion, therefore, that this deed cannot stand, and that the Defendants have not performed the burthen which falls on them, and which is essential for the support of such an instrument.

I must, therefore, make a decree, that the deed be delivered up to be cancelled; but it is not, in my opinion, a case for costs. With the exception that Mr. Phillipson's will does not provide for any receipt of the dividends by Miss *Courtail*, which admits of more than one explanation, and which is erroneous only on the supposition that he considered that this act was unnecessary to enable Miss *Courtail* to receive the dividends, I see no misconduct on his part. It is not he who insists now on the validity of the deed of 7th January, 1857; and the Defendants, in the circumstances of this case, having regard to the interests of the infants, which they were bound to support, could not help resisting this suit to the utmost of their ability. The Defendants, no doubt, will get their costs out of Mr. Phillipson's estate, but that will be in another proceeding, and not in this suit.

The decree will be as I state it, but without costs.

Note.—Upon appeal to the Lords Justices, the decision was affirmed.

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WARDEN *v.* PEDDINGTON.

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THIS bill was filed in *January*, 1862, and the Defendant made the usual affidavit of documents, which was not complained of. He afterwards filed his answer.

The bill was amended in *May*, 1862, and contained a charge that the Defendants had in their possession documents relating "to the matters aforesaid," &c.

An application was now made for the production of documents already admitted, and that the Defendant might make a further affidavit of documents.

Mr. Selwyn and Mr. F. W. Everitt, for the Plaintiffs, cited 15 & 16 Vict. c. 86, s. 18; *Richards v. Watkins* (a); *Willett v. Thiselton* (b); *Noel v. Noel* (c).

[*The Master of the Rolls.* If the Defendant's affidavit is perfect in form, I cannot order him to make a further affidavit.]

The affidavit was sufficient having regard to the statements in the original bill, but it does not extend to the matters contained in the amendments.

Mr. Bromehead, for the Defendant. The authorities cited do not apply, for, in those cases, the first affidavit itself disclosed the fact, that the Defendant had other documents in his possession besides those admitted.

Here

(a) 6 *Jur. (N. S.)* 168.
(b) 1 *N. R.* 42.

(c) 32 *L. J. (Chanc.)* 676.

Practice as to requiring a Defendant to make a further affidavit as to documents.

Where, after a Defendant has made a sufficient affidavit as to documents, the Plaintiff amends his bill, introducing new matters, he is entitled to have from the Defendant a further affidavit of documents as to the amendments.

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Here the Defendant has made a perfect affidavit; he can do no more.

The Master of the Rolls.

The question is whether, as to the new matter, the Defendant ought not make a further affidavit, or that the Plaintiffs should have liberty to file interrogatories on the subject.

I think that, in respect to the new matter, he ought to make a further affidavit. When the affidavit is in form sufficient, I do not think that it can be touched; it is a matter between the Defendant and his conscience. Here the Plaintiffs have amended their bill, and state that the Defendants have documents in their possession relating to their amendments; they might require an answer, but that would only increase the expense. I think the Defendant must, in that state of the case, make a further affidavit as to documents.

Lord Justice *Turner*, in the case cited, said he saw nothing in the statute which tied the Court down to a single affidavit as to documents. If it appears from the Defendant's affidavit that there are additional documents in his possession, I think the Plaintiff may have a further affidavit, even assuming the first affidavit to be in form sufficient as to the matters stated in amended bill.

NOTE.—Order the Defendant to make an affidavit "whether he has or has had in his possession or power any, and if any what, documents relating to the further matters mentioned in the written amendments and accounting for the same."—*Reg. Lib.* 1863, *B.*, fol. 1487.

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HOGG v. COOK.

June 20.

THE testator, *Archibald Hogg*, by his will dated in 1860, after gifts to his son *William Hogg* and his granddaughter *Christiana Hogg*, and a legacy of 50*l.* "to his kinsman, the Rev. *Alexander Rutherford*," bequeathed the residue of his estate and effects "equally amongst such of his grandchildren, and his nephews and nieces, living at his decease, as being sons should attain the age of twenty-one years, or being daughters should attain that age or be previously married; and if there should be only one such child, the whole to be in trust for that only child."

Bequest to the testator's grandchildren and nephews and nieces. The testator had no brothers or sisters, and therefore no nephews and nieces: Held, that the nephews and nieces of his wife were entitled.

The testator died a widower in 1861. He left one son, the Plaintiff *Wm. Hogg*, and one grandchild, the Plaintiff *Christiana Hogg*, but he had no brothers or sisters, and, therefore, no nephews or nieces.

He left a number of nephews and nieces of his deceased wife, including the Rev. *A. C. Rutherford*, the legatee, who was her nephew.

Mr. *Baggallay* and Mr. *Cracknell* for the Plaintiffs.

Mr. *Wm. Morris*, for the illegitimate nephews and nieces of the testator's wife.

Mr. *Southgate*, for the nephews and nieces of the wife, was not heard.

Mr.

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Hogg

v.

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Mr. Jessel and Mr. C. Roupell for some of the same class.

Mr. Taylor for the executor.

The MASTER of the ROLLS.

I must give some meaning to the words "nephews and nieces." In common parlance, no distinction is made between nephews and nieces of the husband and those of the wife.

I am of opinion, that, in this case, all the nephews and nieces of the wife are included, but that if there are any who are legitimate, the bequest cannot include those who are not.

Mr. Jessel asked that the costs of proving the pedigree might be allowed.

The MASTER of the ROLLS.

If they were required to prove their title instead of its being admitted, they must have their costs of proving their pedigree.

NOTE.—*Hussey v. Berkeley*, 2 Edw., 194; *Smith v. Lidiard*, 3 Key & J. 252.

1863.



PINNEY v. SIR WILLIAM MARRIOTT.

June 19, 20,
22.

THE testator Sir *John James Smith*, Baronet, by his will devised and bequeathed as follows:—"And I devise and bequeath all the freehold, copyhold, or customary and real and leasehold estates, and shares of freehold, copyhold or customary and real and leasehold estates, in the counties of *Lincoln* and *Cambridge* (except such as I have hereinbefore disposed of), and all the leasehold lands, tithes and estates, and shares of leasehold lands, tithes and estates, at and near *Sydling*, in the said county of *Dorset*, and elsewhere, which I can dispose of by this my will, with the appurtenances, unto and to the use of the said *Edward Berkeley Lord Portman*, *William Pinney*, *Edmund Henry Dickenson* and *Felix Vaughan Smith*, their heirs, executors, administrators and assigns, according to the nature and quality thereof respectively," upon the trusts hereinbefore mentioned.

The only lands or interest in lands of which the testator could, at the time of his death, dispose by will were lands situate in the counties of *Lincoln*, *Cambridge*, *Norfolk* and *Dorset*.

The question was, whether the lands in the county of *Norfolk*, which were partly of freehold and partly of copyhold tenure, passed under the words "and elsewhere."

The Plaintiffs submitted, that under the devise hereinbefore set forth the whole of the testator's lands in the county of *Norfolk* passed to the Plaintiffs upon the trusts of the will.

1863.

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PIXNEY  
v.  
SIR WILLIAM  
MARRIOTT.

The Defendant Sir *William Marriot Smith Marriot*, the heir at law to the said testator, maintained that the testator died intestate as to all the lands in the county of *Norfolk*, and, as such heir at law, he claimed such of the testator's lands in the county of *Norfolk* as might be adjudged to be of a freehold tenure.

The Defendants, the customary heirs under the tenure of gavelkind to such of the testator's copyhold lands as were situated in the county of *Norfolk*, maintained that the testator died intestate as to all his lands in that county, and they, as customary heirs, claimed such of the testator's lands in the county of *Norfolk* as were of a copyhold tenure.

The case was argued by Mr. *Hobhouse*, Mr. *Selwyn*, Mr. *C. Hall*, the Solicitor-General (Mr. *R. Palmer*) and Mr. *Parke*.

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June 22.

*The Master of the Rolls.*

Upon the fullest consideration I could give to this case, I have come to the conclusion that the Plaintiffs' view is correct. It is a question of the slightest possible dimensions, viz., what is the grammatical effect of the word "elsewhere" in a sentence of a dozen lines.

Upon the general scope of the sentence itself, I think "elsewhere" must belong to the end of it. Supposing I read the sentence thus, leaving out all the intermediate words:—I devise and bequeath all the freehold, copyhold and leasehold property in the counties of *Lincoln* and *Cambridge*, and all the leaseholds in the county of *Dorset* and elsewhere which I can dispose of by this my

my will, with the appurtenances, to *A. B.*" I think "elsewhere" must, in that case, extend to the whole sentence. I think it a just observation to make, that there is nothing specified about its being his own property until he comes to the end of the sentence, where he says, "which I can dispose of." It is all the freeholds in *Lincolnshire* and *Cambridgeshire*, and all the leaseholds in *Dorsetshire* and elsewhere "which I can dispose of by this my will." I think the word "elsewhere" must apply to the whole. If I read it in this way, it would be impossible, I think, to say, that the word "elsewhere" must necessarily be confined to the county of *Dorset*. It would run thus:—all the freeholds in the counties of *Lincoln* and *Cambridge* and elsewhere, and all the leaseholds in the county of *Dorset* and elsewhere which I can dispose of by my will. I think the additional words can make no difference, though a good many observations may certainly arise upon the intermediate words, where he says, "except such as I have hereinbefore disposed of." And there is, in fact, a previous disposition of property in the county of *Lincoln*, but none in the county of *Cambridge*, and none in the county of *Dorset*. It is also to be observed, that he repeats over again the word "leasehold," and he introduces the word "tithes." Though he does that, it appears to me, that the more natural and grammatical construction of it is, to read the word "elsewhere" as belonging to the property he has power to dispose of, the tenure of which he has enumerated in the whole preceding sentence. On looking at the whole scope of the will, I think it is apparent that there is an intention to dispose of the whole of his property, and considering the grammatical construction of this sentence, I am of opinion that it carries the whole of his property wherever it was situate, and I will make a declaration to that effect.

1863.



PINNEY

v.

SIR WILLIAM  
MARRIOTT.

1863.

June 23, 29.

Bequest to a widow "to be applied by her for the payment of my lawful debts, and the residue for her own use and benefit and that of our infant daughter."

*Held*, that this was not a discretionary trust, but that they were equally entitled.

THE testator died in 1848, and his will was as follows:—

"I appoint my wife *Margaret Bibby* the sole executrix of my said will.

"I give and bequeath to my said wife the whole of my real and personal estate, *to be applied* by her for the payment of my lawful debts, funeral and testamentary expenses, and the residue for her own use and benefit and that of our infant daughter *Mary Bibby*."

*Mary Bibby* was still an infant, and the question was, what interest she took in the residue, which consisted wholly of personal estate.

Mr. *Baggallay* and Mr. *Humphrey* for the Plaintiff *Mary Bibby*.

Mr. *Selwyn* and Mr. *Cracknell*, for the executrix and her second husband, argued that there was a discretionary trust as in *Crockett v. Crockett* (*a*), and that the income at least was "to be applied," as the widow thought fit, for the benefit of herself and her daughter, and that therefore the widow was entitled to receive the whole income.

The cases of *De Witte v. De Witte* (*b*); *Bustard v. Saunders* (*c*); *Mason v. Clarke* (*d*), were cited.

The

(*a*) 2 *Phill.* 553.  
(*b*) 11 *Sim.* 41.

(*c*) 7 *Beav.* 92.  
(*d*) 17 *Beav.* 126.

*The Master of the Rolls*, at first, thought that the case came within the principle of *Crockett v. Crockett*, but he reserved judgment.

1863.

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BIBBY

v.

THOMPSON.  
(No. 1.)

*The Master of the Rolls.*

I think my first view of this case was incorrect, and that the residue is divisible between the mother and her child. In *Crockett v. Crockett* the words "be at the disposal" of my wife were used. Here the residue is given to the executrix for "her own use and benefit and that of our infant daughter." That is like a gift to a trustee for the use and benefit of the mother and child.

I think that the mother and the child are equally interested in the residue.

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**BIBBY v. THOMPSON. (No. 2.)**

June 23.

THE testator died in 1848. Under his will his residue was held to belong to his widow and the Plaintiff, his infant child. His widow, who was sole executrix, married Mr. Thompson in 1850.

In 1862, the usual order was made for the administration of the personal estate of the testator, and a balance of 1,517*l.* 7*s.* 2*d.* was found due from Mr. and Mrs. Thompson.

It appeared, however, that in another suit of *Eccles v. Cheyne* orders had been made, in 1856 and 1859, for payment to Thompson and wife, as the personal representatives of the Plaintiff, the solicitor was ordered to pay the amount into Court.

A large balance was found due from the legal personal representatives, but it appeared that the amount had been received, under orders in another suit, by their solicitor, who retained it to satisfy large claims he had against his clients. The cause coming on for further consideration, and on a petition of the Plaintiff, the solicitor was ordered to pay the amount into Court.

1863.  
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 BIBBY
 v.
 THOMPSON.
 (No. 2.)

representatives of the testator, of sums amounting to 1,832*l.* 5*s.* 1*d.* The whole of these sums had been received and retained by Mr. S. B. their solicitor, who claimed a lien on that sum for a large amount for costs and moneys expended for the maintenance of the Plaintiff and her mother. These had been disallowed by the Chief Clerk in the Defendant's discharge, as not coming within the decree.

The cause came on upon the Chief Clerk's certificate and on a petition of the Plaintiff, which prayed that Mr. S. B. might pay the 1,832*l.* into Court.

Mr. Baggallay and Mr. Humphrey for the Plaintiff.

Mr. Selwyn and Mr. Cracknell, for the Defendants.

Mr. Cole, for the solicitor. Unless there be some fraud, a solicitor cannot be brought before the Court by petition; any claim against him, in respect of his receipt of trust money, must be made by bill and not by petition. He has made advances to and incurred expenses for his client, and he has a lien on her interest in the fund. Besides he is accountable to the client only and not to the Plaintiff for his receipts. There is no jurisdiction upon petition to order him to make any payment, but it is premature to do so until the balance (if any) due from him has been ascertained.

The MASTER of the ROLLS.

I think this is a clear case. Here is an administration suit, instituted on behalf of an infant who is interested in the trust fund, against the trustee of the fund, to have it secured in Court and administered for her benefit. It appears that the solicitor of the Defendants has received

ceived the trust fund, under a power of attorney given by the Defendants, and that it has remained in his hands from that time to the present. This is clear, that the trust fund must be ordered to be paid into Court, in order that the persons' rights to it may be ascertained. It may be that the solicitor is entitled to a lien on it, in respect of everything to which the trustee is entitled, and I am prepared to say that the fund shall not be paid out without notice to him.

Here is a gentleman who knew perfectly well that this was a trust fund which partly belonged to the Plaintiff, and that a suit had been instituted respecting it. It appears that 1,517*l.* is due from the Defendants, which ought to be paid into Court, and if it was in their hands the Court would direct it to be paid in. But the solicitor in this cause has this fund in his hands; I think that he cannot retain it against the persons entitled, and that this Court has full jurisdiction, in matters relating to officers of the Court, to direct that to be done which is asked by the petition.

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v.

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NOTE.—See *Mawhood v. Milbanke*, 15 Beav. 36.

1863.

June 27.

A trustee has a primary charge (in priority of the general creditors) to be recouped, out of the life estate of a deceased tenant for life, the amount of trust moneys wrongfully received by him and for the costs of suit.

Moneys are never paid out of Court to an administrator *ad litem*.

WILLIAMS v. ALLEN. (No. 2.)

SUBJECT to their life estates and to trusts for their children, which failed, the ultimate limitation of the funds in the marriage settlement of Mr. and Mrs. *Norman*, dated in 1831, was to her next of kin. She died in 1858, and her husband died in 1860, and thereupon this limitation took effect.

The suit was instituted in *April*, 1860, by the next of kin of Mrs. *Norman*, seeking to make Mr. *Allen*, the trustee of her settlement, liable for 1,368*l.* New £3 per Cents. and other trust funds which were not forthcoming. The trustee said, that the produce of the £3 per Cents. had been received by Mr. and Mrs. *Norman*, the tenants for life, and they being dead, he required their legal personal representatives to be made parties. The Master of the Rolls, at the hearing, held (*a*) that they were necessary parties, and thereupon the Plaintiff procured administration *ad litem* only to be granted, and made such administrators Defendants to the bill. The Master of the Rolls, on the 10th of *February*, 1862, held this to be insufficient; but the Lords Justices, on the 30th of *April*, 1862, were of a different opinion.

By the decree, made on the 6th of *June*, 1862, it was declared, that Mr. *Allen* was liable to make good the 1,368*l.* £3 per Cents. and the dividends since the death of Mr. *Norman* in 1860, and he was ordered to pay so much of the costs as had been rendered necessary in recovering

(*a*) 29 *Beav.* 292.

recovering this sum. An inquiry was however, at his instance, directed, as to whom and in what manner he had disposed of the moneys arising from that fund.

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WILLIAMS
v.
ALLEN.
(No. 2.)

The Chief Clerk found, that the fund had been sold out in 1833 and 1834, and that the produce had been paid to Mrs. *Norman*, under the circumstances stated in the answer of Mr. *Allen*. In taking the accounts, it appeared, that the arrears of the income of the trust funds which had arisen in the lifetime of Mr. and Mrs. *Norman* was far more than sufficient to replace the amount for which Mr. *Allen* was liable, for the income had not, for a long period, been received.

The question now discussed was, whether the arrears of income was to be applied in replacing the trust fund, in priority of the general creditors of the tenants for life, it being suggested that all the debts and claims ought to be paid *pari passu*.

Mr. Baggallay and Mr. Whitehorn for the Plaintiffs.

Mr. Martindale for the administrator *ad litem*.

Mr. Selwyn and Mr. Steere for the trustee.

Mr. Burdon for Wood.

The MASTER of the ROLLS.

It appears to me that the trustee has a primary charge upon this fund, which represents the interest of the tenant for life, and that he ought to be recouped, out of it, the amount of the trust moneys received by the tenant for life.

There

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WILLIAMS
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(No. 2.)

There may be a surplus, and if so, I am of opinion that the trustee is entitled to his costs out of it. If anything should remain, it must be ascertained how much of it belongs to Mrs. Norman, and it must be carried to the account of her legal personal representative; the same must be done as to so much as belongs to Mr. Norman. There must be a full representation before the shares can be paid out of Court.

NOTE.—Reg. Lib. 1863, B., fol. 1441.

BROOKE v. MORISON.

June 22.

On an application to serve a bill out of the jurisdiction, the Court does not require the allegations of the bill to be stated, the Plaintiff must take the order at his own risk.

M^{R.}. GRAHAM HASTINGS moved to serve the bill on a Defendant resident in Jersey, out of the jurisdiction. He asked the Court whether it was necessary to state the facts, so as to shew that the case came within the acts and orders (2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82; 15 & 16 Vict. c. 86, s. 4, and 10th Consolidated Order, rule 7).

The MASTER of the ROLLS.

You must take the order at your own risk. I could not usefully go into the facts and circumstances of the case, for the bill always makes out a *prima facie* case for service abroad.

NOTE.—See *Cookney v. Anderson*, 32 L. J. (Chanc.) 427; *Steele v. Stuart*, 10 Jur. (N. S.) 15; *Foley v. Maillardet*, 9 L. T. 643.

1863.

BARNES *v.* BOND.

June 29.

THE testator directed his debts to be paid, and he devised and bequeathed his real and personal estate to *Elizabeth Bond* for her life, with remainders over. He provided that, in case his personal estate should be insufficient to pay his debts, his real estate should be sold for that purpose.

As between tenant for life and remainderman, the interest on the testator's debts must be borne by the income, as from the day of his death.

The testator died in *May*, 1859, and in *July*, 1860, this suit was instituted for the administration of his estate, and the real estate had been sold.

Some of the testator's debts, which carried interest, had fallen into arrear since the testator's death, and the question now arose, how the arrears of interest subsequent to the testator's death ought to be borne.

Mr. *Martindale*, for the tenant for life, argued that the debts and interest ought to be paid out of the corpus of the estate, or at all events that the interest should not begin to be paid out of the income until one year after the testator's death. He cited *Griesley v. The Earl of Chesterfield* (a); *Shore v. Shore* (b); *Coote v. Lord Milltown* (c); and see *Yates v. Yates* (d).

Mr. *Appach* and Mr. *Haynes* for the Defendants.

The MASTER of the ROLLS.

The interest of every debt which carries interest must be kept down out of income, and the tenant for life must
be

(a) 13 *Beav.* 288.(b) 4 *Drew.* 219, 501.(c) 1 *Jones & Lat.* 501.(d) 28 *Beav.* 637.

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 v.
 BOND.

be put in the same situation as if the debts had been paid the day after the testator's death. If the tenant for life receives the whole income while the interest on the debts is running into arrear, he is liable to make good such arrears, and I cannot make any distinction between one year and another. The estate ought to be ascertained at the end of one year and the corpus and income duly applied; but if the testator's debts amounted to one-half his estate and the winding-up has been delayed for four years, the tenant for life cannot be allowed to take the income of the whole estate during that period and throw the arrears on the corpus.

In re PARKER'S CHARITY.

July 4.

A testatrix, in 1763, bequeathed her residue in trust for the vicar of N. for the time being, for ever, he annually preaching a sermon, the same to be paid "in augmentation" of the vicarage. The income had not been paid from 1841 to 1863, and in 1847, a sequestration had issued against the vicar, and he had become insolvent in 1852, but no sequestration

MRS. PARKER, by her will dated in 1763, bequeathed her residue to trustees, on trust to invest it in the public funds, "for the sole use and benefit of the vicar for the time being of the vicarage of Newton, near Swaffham in Norfolk (which is a very small and poor vicarage, whereof my late deceased husband was vicar) for ever, such vicar for the time being, in the forenoon of every 21st day of June, for ever, preaching, in the parish church of Newton aforesaid, immediately after divine service, an anniversary sermon, in commemoration of me and this my bequest. And I do hereby will, order and direct, that the yearly or other dividends and proceeds of the whole of my said residuum shall, from time to time for ever, be received and paid to the vicar of the said vicarage of

Newton

had issued upon it. The Court assumed the assent of the ordinary: and Held, that the gift constituted an augmentation to the living, and not a mere legacy to the vicar for the time being, and that the arrears down to 1847 belonged to the vicar, and the subsequent income to the sequestrator.

Newton for the time being, *in augmentation* thereof, which is agreeable to the intent and desire of my said late dear husband deceased, who had but very small preferment himself in the church."

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CHARITY.

The Rev. *John Hague Bloom*, the present vicar of *Newton*, was instituted in 1841, but he was ignorant of this bequest until *September*, 1858, and he failed to preach the sermon until 1859. The consequence of which was, that the income of the residue (827*l.* Stock) accumulated and now amounted to 447*l.*

In the meanwhile, Mr. *Seppings* had, in 1847, obtained a sequestration, on a judgment against the vicar, "of all the rents and rent-charges in lieu of tithes, oblations, obventions, fruits, issues and profits, and other ecclesiastical goods whatsoever, of or belonging to the vicarage," for levying 2,003*l.*

After this, Mr. *Bloom* had, in 1852, taken the benefit of the Insolvent Act, but no sequestration had issued under the insolvency.

This was a case submitted for the opinion of the Court, with the sanction of the Charity Commissioners, as to the proper application of the accumulated fund.

Mr. *Speed* for the Bishop.

Mr. *Erskine*, for the vicar, claimed the arrears between 1841 and 1847, which, he argued, were never reached by the sequestration, nor touched by the insolvency.

Mr. *Jessel*, for the assignee in insolvency. The arrears, down to the insolvency in 1852, passed to the vicar's

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vicar's assignee. It is quite true, that the assignee could not touch the income of the benefice, except through a sequestration, under the 1 & 2 Vict. c. 110, s. 55. But this income formed no part of the ecclesiastical benefice; it was a mere charitable gift, by will, to the person for the time being filling the character of vicar. This did not make it part of the benefice, nor did it give the Bishop any jurisdiction in the matter. The condition attached to the bequest shews it: for if the vicar had refused to preach the sermon, the Bishop could not have appointed a curate to perform that duty or have allotted to him any portion of the income. The sequestrator is the mere bailiff of the Bishop, and is accountable only in the Bishop's Court (a); and he can only seize those things over which the Bishop has jurisdiction.

The testatrix herself had no power to make her residue part of, or, strictly speaking, an augmentation to the benefice, though it may be done under the acts relating to Queen Anne's bounty, and the church building acts. This bequest constituted a mere trust in favour of the incumbent for the time being, which was alienable by him, and the arrears, therefore, passed to his assignee under his insolvency.

Mr. Dickinson and Mr. Phear, for the sequestrator, were stopped by the Court.

The MASTER of the ROLLS.

I think the sequestrator is entitled and on this ground:—I adopt a portion of Mr. Jessel's argument, and I admit that if a fund is provided for the purchase of

(a) 3 Burn's Ecc. Law, 590.

of the performance of church services by the incumbent of a living, that does not create an augmentation of the ecclesiastical benefice. But I think it quite open to any person to augment any benefice in this country, and that it does not require any statute to enable him to do so. He can leave money or give land if he comply with the formalities required by the Statute of Mortmain, and may annex to the gift any condition which is not illegal, provided the Ordinary consents. Here, the trust having been acted on for 100 years, I must assume such consent to have been properly given.

Next, as to the construction of the will, whether this bequest is an augmentation of the benefice assented to by the Ordinary or a mere charitable gift for preaching a sermon. I find it is given for the sole use and benefit of the vicar for ever. If it stopped there, I should have held it to have been given by way of augmentation of the vicarage. Then he is annually to preach a sermon, but that is not the object of the charity, but is a condition annexed to the gift, which makes it necessary for the vicar to perform that duty to enable him to obtain the particular dividends in that year. If he should wilfully break the condition (a) he would not be entitled to the dividends for that year, and they might possibly be applied *cy pres*, and if he refused to perform the condition for fifty years, there might be a large sum accumulated, which would make it necessary to apply to the Court, and the Court might possibly apply it in augmentation of the vicarage; but that is not the case here. The further words of the bequest make the meaning clear beyond all question, for the testatrix orders and directs the dividends to be paid to the vicar of the vicarage "in augmentation thereof." Being so, the sole question

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*In re
PARKER's
CHARITY.*

(a) See *In re Connington's Will*, 2 L. T. (N. S.) 535.

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*In re*  
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question is, whether the bequest is illegal or requires any particular form to give it sanction. I am of opinion that it only requires the assent of the patron and Ordinary, and that, at this moment, the arrears form part of the endowment of the benefice, and are applicable in the same way as the small tithes.

I am of opinion that the sequestrator is entitled to the income from the year 1847, and that he will be entitled to the accruing income until the sequestration is discharged; but that the vicar is entitled to the arrears prior to that time.

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## MADDISON v. PYE.

*July 6, 7.*

An estate was devised for sale and a portion undisposed of descended on the heir.

Held, that the costs of a suit to administer the real estate fell on the devisees and heir *pari passu*.

THE testator died in 1835, having devised his estate on trust for sale at a future period, and having given the produce as therein mentioned.

His personal estate was duly administered, but questions having arisen as to the rights of the heir at law in the real estate, a suit was instituted in 1846, praying that the rights to the testator's freehold and copyhold estates might be ascertained and declared. After the suit had proceeded for some time, the parties, in 1851, compromised the suit, and "it was agreed that the general costs of the cause (not thereinbefore provided for) should be taxed and should stand a charge on the *corpus* of the estate as the Court might decree." By an order of the Court, all proceedings were stayed until the death of the testator's widow, and the costs not provided for by the agreement were reserved.

The widow died in 1861, and the real estate then became saleable.

It

It turned out that part of the produce of the devised estates had lapsed to the heir at law, it not having been disposed of by the will, and the question was, whether it was primarily liable to the costs of the administration suit or only *pari passu*.

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MADDISON
v.
PYE.

The Master of the Rolls.

Eyre v. Marsden (a) settles this: where a real estate is disposed of in favour of several persons, and the suit is solely for the administration of the real estate and some of the shares lapse, these shares are not to be made to bear the costs of the suit, but the costs are to be borne by the real estate generally, and the heir at law's estate is not to bear all the costs.

July 7.

I think the terms of this agreement for compromise mean that the costs shall be borne by the whole of the estate; the words are that the costs "shall stand a charge on the corpus of the estate," which means on the whole estate; and then are added these words, "as the Court may decree," the meaning of which is not, that everybody is to have his costs, but that the Court may, if it think fit, say, one party is to have his costs and several others are to have but one set of costs between them.

I think the agreement and practice of the Court settles this question. I have always understood the rule to be this:—in suits for the administration of the personal estate, the part of it undisposed of is first applicable to the payment of the costs. But the rule is different as to real estate, there the heir at law is only charged with his proportion of the costs of suit.

(a) 4 *Myl. & Craig*, 231.

1863.

July 1, 2.

A testator died in *August*, 1861, and in *September*, 1861, his executors remitted to their solicitor *80l.* to obtain probate and *25l.* to pay legacy duty. The solicitor became bankrupt in *November*, 1861, and the money was lost. The Court allowed the executors the *80l.*, but not the *25l.*, the latter advance being premature, the legacies not having yet (1863) been paid.

THE testator died in *August*, 1861, and in *September*, 1861, the executors remitted *80l.* to their solicitor, *Edward Charles Peagam*, to enable him to procure probate of the will of the testator. He also obtained *25l.* from the executors to pay legacy duty. *Edward Charles Peagam* became bankrupt in *November*, 1861, whereby the *105l.* was wholly lost to the estate of the testator, and the question was, whether it ought to be allowed to the executors. At the request of the executors, the Chief Clerk reserved the question for the consideration of the Court.

The legacies still remained unpaid.

Mr. Osborne and Mr. Sandys for the Plaintiffs.

Mr. Baggallay and Mr. E. K. Karslake, for the executors, cited *Bacon v. Bacon* (a); *Williams on Executors* (b); and see *Swinfen v. Swinfen* (No. 5) (c).

The Master of the Rolls thought he was warranted in allowing the *80l.* which had been retained by the solicitor for two months before bankruptcy, but that he could not allow the legacy duty, which only became payable on payment of the legacies.

(a) 5 Ves. 331.

(b) Page 1648 (4th edit.)

(c) 29 Beav. 211.

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INGLE v. PARTRIDGE.

July 3.

IN February, 1859, the Defendants *Partridge, Fry* and *Williams* were appointed new trustees of a marriage settlement. In March, 1859, they opened a trust account with *London* bankers, and gave them written instructions to "honor the drafts of any two of us, or of Messrs. *Goodwin & Co.*, No. 3, *Lancaster Place, Strand*, our solicitors on our behalf." *Williams* was a member of the firm of *Goodwin & Co.*

Part of the trust funds (consisting of ready money and the produce of some mortgages called in) was paid into the bank to the trust account, to the extent of 3,020*l.* 6*s.* 7*d.* It was drawn out by *Williams*, in the name of the firm of *Goodwin & Co.*, and was applied by him to his own use. Another sum of 236*l.* £3 per Cents., which was standing in the names of the three trustees, was sold out by them, and the produce, 299*l.*, was paid over to *Williams* alone.

Trustees authorized a firm of solicitors (one of whom, *W.*, was a trustee) to draw the trust funds out of a bank. *W.* drew it out and misapplied it. The trustees were, on interlocutory application, ordered to pay the amount into Court.

Three trustees sold out trust funds and the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into Court.

Upon the admission of these facts by *Partridge* and *Fry*, a motion was made that they should pay the amount into Court.

Mr. *Hobhouse* and Mr. *Beavan* in support of the motion.

Mr. *Baggallay* and Mr. *Cracknell*, for the Defendants, argued that the Court only ordered trust moneys into Court when they were in the hands of the trustees or under their controul, and that here it was in the hands of the trustee, *Williams*, alone.

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The Master of the Rolls ordered the two Defendants *Partridge* and *Fry* to pay the amount into Court, but gave them until *Hilary Term, 1864*, to comply with the order.

NOTE.—See *Beaumont v. Meredith*, 3 *Ves. & B.* 180; *Vigors v. Binfield*, 3 *Mad.* 62; *Johnson v. Aston*, 1 *Sim. & St.* 73; *Collis v. Collis*, 2 *Sim.* 865; *Rothwell v. Rothwell*, 2 *Sim. & St.* 217; *Wyatt v. Sharratt*, 3 *Beav.* 498; *Hinde v. Blake*, 4 *Beav.* 597; *Whitmore v. Turquand*, 1 *Johnson & H.* 296; *Score v. Ford*, 7 *Beav.* 333.

DIXIE v. WRIGHT.

July 3.

Freeholds in which a lunatic was interested were taken compulsorily by a company, and the purchase-moneys, which, under the act of parliament, were liable to be invested in land, was paid into Court and laid out in the government funds. The existence of the fund was overlooked, and it went on accumulating.

A. B., who became tenant in tail in possession, with immediate remainder to her

in fee, by her will, devised her real estate and bequeathed "all such capital stock and moneys as she should be possessed of or interested in, at her death, in the public, government or parliamentary funds," but she expressed no further intention as to conversion. Held, that the principal fund passed as real estate and the accumulations as personal estate.

BY this act (34 Geo. 3) the *Ashby-de-la-Zouch Canal Company* had compulsory powers of taking lands, but the purchase-moneys payable to tenants in tail, lunatics, &c., &c., were to be laid out in lands and conveyed to the same uses as the lands taken; and, in the meanwhile, the purchase-money was to be invested in the public funds or government or real securities.

In 1794, the company took twenty-three acres of land which belonged to Sir *Wolstan Dixie* (a lunatic) in tail, with remainder to *Eleanor Frances Pochin* in tail. The purchase-money, 1,150*l.*, was paid into Court and invested in 1,681*l.* £3 per Cents. It had accumulated and now amounted to 2,680*l.* Stock and 4,408*l.* cash.

Sir *Wolstan Dixie* died in 1806, having done no act to affect the fund.

Eleanor

Eleanor Frances Pochin died in 1823, having done no act affecting the fund, and being apparently ignorant of its existence. By her will, she devised all her real estate on certain trusts, and after making a variety of specific and pecuniary bequests, the testatrix thereby gave and bequeathed *all such capital stock and moneys as she should be possessed of or interested in, at her death, in the public, government or parliamentary funds, or on any other securities, arrears of rent, and all other moneys whatsoever, which should be or become due or owing or payable to her, or should accrue from any unadministered effects of her late father and brother, or any of them, or which she should be possessed of or any ways entitled to at the time of her decease, or which should, at any time, become payable to her or her representatives, after the payment of her debts, &c., to three trustees on trusts which differed from those of her real estate.*

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Upon her death, the estates tail determined, but she was also entitled to the reversion in fee of the lands.

The question was, whether this fund was real or personal estate.

Mr. Selwyn and Mr. W. Pearson for the Plaintiff.

Mr. Mander, Mr. Eddis, Mr. Baggallay and Mr. Whitehead for the Defendants.

On the one hand, it was argued, that this fund was impressed with a positive statutory obligation to be laid out in land, and that no act having been done to convert it into personal estate, it passed under the will as realty.

On the other side, it was contended, that the fund passed

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passed under the bequest contained in the will of the absolute owner, of all her capital stock in the government funds in which she was interested at her death. But that, at all events, the accumulations of dividends formed personal estate.

The Master of the Rolls.

I am of opinion, that the capital fund passed as real estate. Here twenty-five acres were taken by a canal company, under the authority of the act of parliament, compulsorily and against the will of the owner. It produced 1,150*l.*; that sum was paid into Court, and represents exactly the land as it was before it was so taken. The tenant in tail was entitled to it in exactly the same way as he was to the land, and until he took some step to convert it into money, it must, in this Court, be treated as money to be invested in land to the like uses. On his death, Mrs. Pochin became entitled in fee, and she might have taken it as money, but for that purpose it was necessary that she should express some intention, for unless she did so, it still retained its character of real estate.

It is admitted that she expressed no intention whatever, because she was ignorant of the existence of the fund. If she had expressed the slightest intention to convert it, it would have acquired the character of money, and have passed as such by her will. But she has expressed no intention, and, therefore, the 1,150*l.* must go as real estate, but all the accumulations pass as personal estate, and are subject to the trusts of the personal estate.

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ROBINSON v. SHEPHERD.

July 8.

THE testator devised an estate to trustees, upon trust to sell, and to divide and pay the sale moneys "to the persons, being such descendants as next hereinafter mentioned, *in equal shares*, among and to the lawful descendants living at the time of his (the testator's) death, of such of the brothers and sisters of his late grandfather, *Henry Pearson*, deceased, as had died leaving lawful descendants, such descendants, respectively, to be entitled to share the same moneys in a course of distribution *per stirpes and not per capita.*"

Bequest to the descendants of the brothers and sisters of the testator's grandfather, in equal shares, *per stirpes* and not *per capita*. There were two sisters. Held, that the fund was divisible, in the first instance, into moieties, and that one belonged to the descendants of one sister *per capita*, and that the other moiety similarly to the descendants of the other.

There were two such sisters who had died leaving lawful descendants, but no such brothers.

The Master of the Rolls (after referring to *Pearson v. Stephen* (*a*), and *Dick v. Lacy* (*b*), but which he thought did not govern the present case) said—

How can I give the fund "*per stirpes and not per capita*," and at the same time give it "*in equal shares*." I am of opinion, that the correct construction is, that there are two roots, that the fund must be divided into two parts, and then that one of them must be divided equally amongst the descendants of one daughter, and the other moiety amongst those of the other daughter, living at the death of the testator. If one left eleven and the other five descendants, it would have to be divided

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divided into two equal shares, and one such share would then be divided in elevenths and the other in fifths.

This is my opinion, and I will make a declaration to that effect.

PONSARDIN v. STEAR.

July 9.

A notice of motion to dismiss for want of prosecution is irregular, if served prior to the Plaintiff's being in default, although, at the time when the motion is heard, the Plaintiff is in default.

BEFORE the Plaintiff was in default, according to the General Orders (*a*), the Defendant gave notice of motion to dismiss for want of prosecution; but it was admitted that the Plaintiff was in default at the time the motion was made.

Mr. *De Gex* in support of the motion. The General Order states under what circumstances a motion to dismiss may be made; but says nothing as to the time when the notice may be given. It would be a great hardship on a Defendant, where the Plaintiff is in default on the day before the last seal day, to hold that he cannot give notice to the Plaintiff, by anticipation, that unless he takes the proper steps to proceed in his cause application will be made at the last seal day to dismiss the bill. If it were so held, the result would be, that the suit would be tied up during the whole of the long vacation. There is no case in which it has been held, that it is irregular to give a notice of motion in anticipation of a default.

Mr. *Selwyn* and Mr. *Gardener*. This proceeding is totally irregular, and, if it were allowed, every Defendant might give notice of motion to dismiss for want of prosecution

(*a*) 33 Consol. Ord. III.

secution the day after he had filed his answer. They were stopped by—

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*The Master of the Rolls*, who said,—This motion is clearly irregular, and I must refuse it with costs.

## EDWARDS v. BROUGHTON.

July 10.

THE testator, who died in 1826, bequeathed his residue to *Eleanor Cormack*, his widow, during her life or widowhood, with remainder equally between his five children, *Rebecca*, *Edward* and three others. And he gave his widow the power of settling the daughters' share on the daughters for life, with remainder to their children. And he also directed, that if either of his five children should die under the age of twenty-three years without leaving issue, the surviving children should have and take the portion of such dead child.

The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, and all other her share by survivorship or otherwise, and all her right, contingent, reversionary or otherwise, possibility, &c. therein. She afterwards became entitled to a further share, by the death of a brother intestate. Held, that it was not included in the settlement.

After all the children had attained twenty-three, *Rebecca* married, and by the settlement, made on her marriage, dated the 5th of February, 1845, after reciting the will and the funds composing the residue, and that *Eleanor* (the widow) was desirous, in pursuance of the power, to settle the share of *Rebecca Cormack* of and in the said Bank Annuities and personal estate in the manner thereafter expressed, it was witnessed, that in exercise of the power, *Eleanor Cormack* assigned and *Rebecca Cormack* assigned unto trustees "all that one-fifth part, share or proportion of and in the said sums of [stating the trust funds], and all and every other the parts, shares and proportions of her *Rebecca Cormack*,

by

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 ~~  
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*by survivorship or otherwise*, of and in the same, and of and in the securities for the same for the time being, and of and in the dividends, interest and annual proceeds of the same respectively, and all the estate, right, title, contingent, reversionary or other interest, possibility, claim and demand whatsoever of them *Eleanor Cormack* and *Rebecca Cormack*, and each of them, of, in, to or concerning the same or any part thereof," to hold upon the usual trusts of a marriage settlement.

*Edward Cormack* "died in or after the year 1835 (a) intestate," and his sister *Rebecca* became entitled to one-fifth of his share of the trust funds.

The widow died in 1860, and the question raised by this special case was, whether *Rebecca's* interest in *Edward's* share was subject to the trusts of her settlement.

Mr. *Graham Hastings*, for *Rebecca*, argued, that it was not within the settlement. That if *Edward* had given it to his sister by his will, the case of *Parkinson v. Dashwood* (b) would strictly have applied, and that the taking it as his next of kin could make no difference.

Mr. *Dauney*, contrd. As, at the date of the settlement, all the children had attained twenty-three, there could be no survivorship under the settlement, and, therefore, something beyond that must have been intended. Some operation must also be given to the words "or otherwise." The case cited is distinguishable, and here the word "possibility" is used, which is sufficient to include this interest.

*The*

(a) There was a difficulty in fixing this date, but the Judgment proceeded on the fact that

*Edward's* death was subsequent to the settlement.

(b) 30 Beav. 19.

*The Master of the Rolls.*

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I think this case is governed by my decision in *Parkinson v. Dashwood*, and I cannot distinguish it. I consider that this share was vested in the brother, and it came from him exactly as the property did from the father in *Parkinson v. Dashwood*. I must, therefore, hold that it was not included in the settlement.

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**RAVENS CROFT v. JONES.**

July 13.

**T**HE testator, Mr. Jones, by his will dated in 1849, bequeathed a legacy of 700*l.* to his daughter *Martha Jones*.

In June, 1855, *Martha Jones* married the Plaintiff *Alfred Ravenscroft*, and about three months previously to the marriage, and about three weeks after she had told her father of her intended marriage, her mother gave her 100*l.* in country bank notes, and said it was from her father.

A bequest of 700*l.* to a daughter before her marriage, — Held, not deemed by a simple gift of 100*l.* by the latter to the husband after the marriage, nor by an advance of 100*l.* to the daughter on her marriage for her outfit.

As to this sum *Martha Ravenscroft* said:—

“I had nothing else given to me to provide for my wedding and marriage. Out of that sum I bought my own wedding dress, and paid for other articles of dress and linen and other necessaries which I required on my marriage, and I also paid the expenses of a journey to *London*.”

*Alfred Ravenscroft*, in his affidavit, stated as follows:—

“About three weeks after our marriage, I was at the house

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house of my wife's father, in a room adjoining to that in which he was, and his wife placed in my hand country bank notes to the amount of 400*l.*, and said, 'Mr. Jones told me to give you this.' I went into the other room and thanked my father-in-law, who said 'he hoped it would do me good.' He said nothing then or at any other time of his will or his intentions as to his property, nor did I know anything about them."

The testator made a codicil in 1856, and died in 1859, leaving ten children. The question was, whether the legacy to his daughter *Martha* was deemed to the extent of the 100*l.* and 400*l.*

The widow of the testator, in her affidavit, said, she had no doubt whatever, from conversations she had had with the testator, that he intended these sums as part of the legacy of 700*l.*

Mr. Southgate and Mr. J. H. Taylor for Ravenscroft and wife.

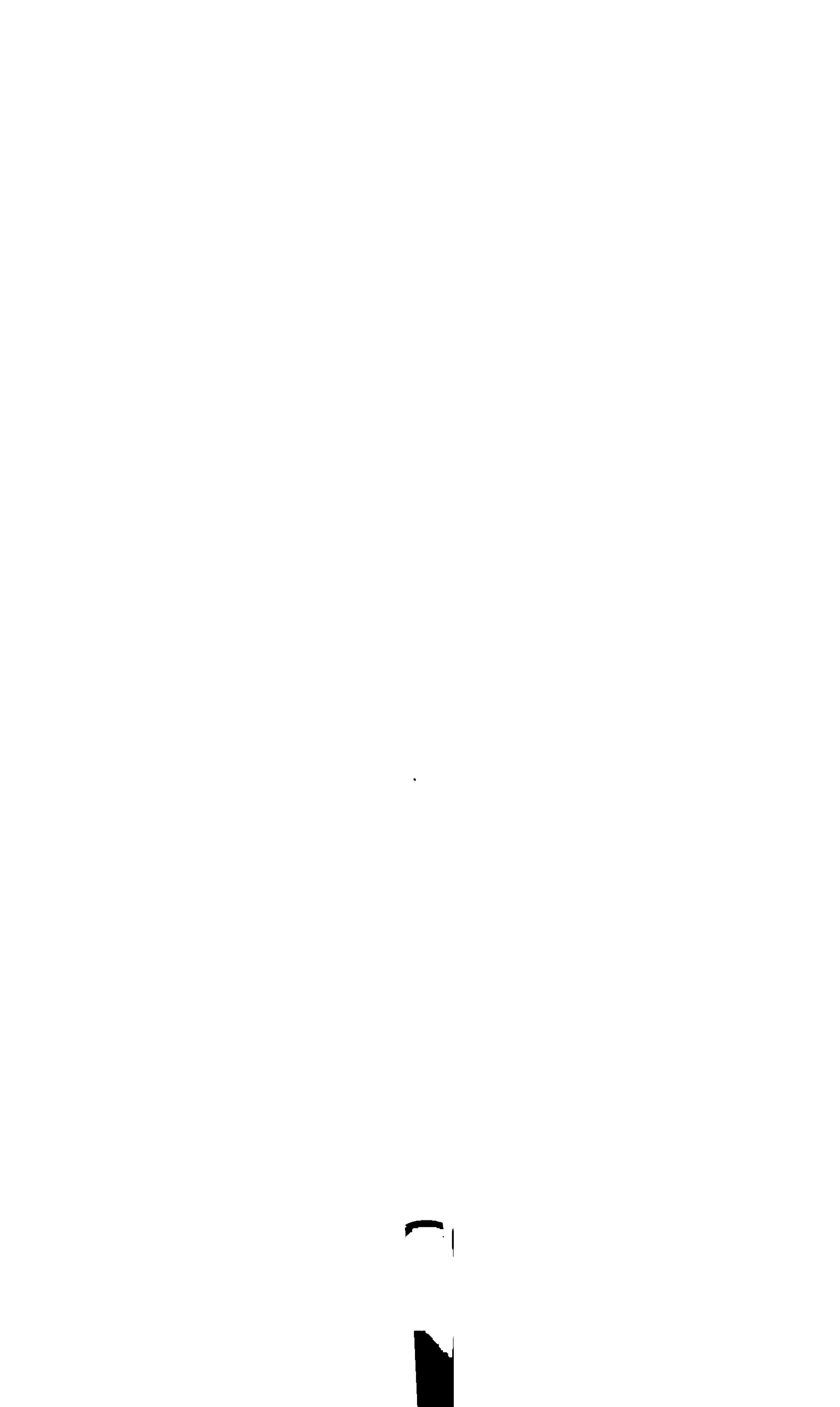
Mr. Woodhouse, Mr. Hobhouse, Mr. Bristow and Mr. Swanston, for the Defendants. Powys v. Mansfield (a); M'Clure v. Evans (b); Kirk v. Eddowes (c); Montefiore v. Guedella (d), were cited.

The MASTER of the ROLLS.

I do not know any case in which it has yet been determined that the gift of a sum of money to the husband of a daughter, by her father, *simpliciter*, after the marriage, and not in consequence of any promise previous to the marriage

(a) 3 *Myl. & Craig*, 359.
 (b) 29 *Barr.* 422.

(c) 3 *Hare*, 509.
 (d) 1 *De G., F. & J.* 93.



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by the Court. Nothing can be more dangerous than to revoke a testator's will, because some one partially or imperfectly recollects a conversation which may have occurred, in which the testator may have made use of certain observations as to his intentions.

I am of opinion that this gift of 400*l.* is not an ademption of the legacy given by the will of this testator, and if he had so intended he might have stated so subsequently, in the codicil to his will.

With respect to the 100*l.* given to the daughter at a time when she was engaged to be married, it appears that as soon as she told her father of her engagement, he gave her 100*l.*, out of which she provided her wedding clothes and for her wedding trip. It does not appear how or by whom the wedding clothes of the other daughters were provided; I presume that they were provided by the father, because they had nothing but what was given by him. Usually a wedding outfit is not treated as an ademption of a legacy previously given; it is only providing that which is absolutely necessary, and is nothing more than an advance of money to pay for clothes necessary for a child's use, and resembles money given for a child's maintenance.

I am therefore of opinion that Mrs. *Ravenscroft* is entitled to the whole legacy given her by the will, and that these sums constitute no ademption.

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*Note.—Appeal dismissed by the Lords Justices 30th January, 1864.*

AN

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**"AND" READ "OR."**

A testator gave to each of four persons, when and as they respectively attained twenty-one, one-fourth of his residue for life, and in case either of them "should happen to die under the age of twenty-one years *and* without leaving lawful issue," then he gave his share to the survivors for life. And from and after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue. And if all four legatees should die without leaving lawful issue, there was a gift over. One of the legatees attained twenty-one and died without issue: —Held, that her share was undisposed of, the Court being of opinion that "and" could not be read "or." *Coates v. Hart.*

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2. When a mortgage is given by a customer to his bankers for a fixed sum, and not for the running balance, the banker cannot include that sum in the banking account and charge compound interest on it. *Mosse v. Salt.* 269

*See BANKER.***CONDITIONS OF SALE.**

By the conditions of sale relating to leaseholds it was stipulated, that the production of the last receipt should be conclusive evidence that all the covenants had been performed. Held, that the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises. *Bull v. Hutchens.* 615

**CONSIDERATION.***See IMMORAL CONTRACT.***CONSIGNEE.***See SHIP.***CONSTRUCTION.***See ANNUITY, 2, 3.**CONTRACT, 2, 3.**COVENANT.**COVENANT TO SETTLE.**FORFEITURE.**REFERENTIAL TRUSTS.**RESIDUE.**SETTLEMENT, 2.**STATUTE.**WILL and its references.*

## CONSULTATION.

*See Costs*, 5.

## CONTRACT.

1. The Plaintiff asserted that he had contracted to purchase some shares from the Defendant, but the contract was not in writing, the fact was contested and it was proved by the Plaintiff alone. There was, however, proof that the Plaintiff had paid the Defendant money, but on what account did not appear, and that the Defendant had admitted, in writing, that the shares belonged to the Plaintiff, though they had not been transferred for fourteen years. Held, that the contract was sufficiently proved. *Parish v. Parish.* Page 207

2. A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification), and an acceptance (also specifying no limitation or qualification), is a contract for the whole. *Thorn v. The Commissioners of Her Majesty's Works and Public Buildings.* 490
3. The Defendants advertised that offers would be received for old *Portland* stone of *Westminster Bridge*. The Plaintiff made an offer for the stone of a particular quality, which was accepted:—Held, that this was a contract for the purchase of all the stone of that quality. *Ibid.*

*See IMMORAL CONTRACT.**MARRIAGE CONTRACT.*

## CONTRIBUTORY.

*See WINDING-UP*, 5.

## CONVERSION.

1. Commissioners having compulsory powers to purchase lands gave notice to an owner of freeholds of taking them, and to treat. He, in reply, stated the price he was willing to take, but he died before the acceptance of the offer. The purchase was afterwards completed at that price. Held, that the real estate had not been converted into personalty at the death of the owner, and that the purchase-money belonged to his heir-at-law. *Re Battersea Park Acts.*

Page 591

2. Freeholds in which a lunatic was interested were taken compulsorily by a company, and the purchase-moneys, which, under the act of parliament, were liable to be invested in land, was paid in Court and laid out in the government funds. The existence of fund was overlooked, and it on accumulating. *A. B., w* came tenant in tail in pos with immediate remainde in fee, by her will, devise estate and bequeathed capital stock and mo should be possessed rested in at her dea lic, government or funds," but she further intention

cumulations as personal estate.  
*Dixie v. Wright.*      Page 662

### COPYRIGHT.

*See* COPYRIGHT OF DESIGN.  
 REGISTRY OF DESIGN.

### COPYRIGHT OF DESIGN.

1. Distinction between the two acts relating to the copyright of design (5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 75). The first applies to new designs for the ornamentation of articles, the second to new designs of articles of utility.  
*Windover v. Smith.*      200

2. A design of a carriage was registered under the 6 & 7 Vict. c. 75. The inventor claimed four things as new, and as conducive to the "utility" of the design. There was no novelty as to three of them, and they did not contribute to the "utility." The fourth tended to its utility, but was the mere extension of a well-known principle. Held, that the claim to monopoly could not be supported under the above act, and that the design was not protected under the former act (5 & 6 Vict. c. 100), as an ornamental design, it not having been registered under that act. *Ibid.*

*See* REGISTRY OF DESIGN.

### CORPUS.

*See* ANNUITY, 2.  
 TENANT FOR LIFE AND REMAIN-  
 DERMAN, 1.

### COSTS.

1. Costs of exceptions allowed, and

of those disallowed apportioned and set-off. *Dally v. Workam.*

Page 69

2. Costs of a second petition to wind-up allowed, under the circumstances. *Re the Commercial Discount Company, Limited.* 198

3. When parts of an estate are taken by several railway companies, and the united compensation moneys are invested in one purchase, the ordinary costs of re-investment are to be borne by them equally, and not in the proportions of their respective compensation moneys so re-invested. *In re the Maryport, &c., Railway Act. Ex parte the Earl of Lonsdale.*      397

4. Portions of an estate were taken by three companies, two of which afterwards merged into one company:—Held, that the amalgamated companies must bear two-thirds of the costs of a joint re-investment. *Ibid.*

5. The Defendant was one of two trustees for sale of an estate, the produce of which was divisible amongst persons *sui juris*. He refused to concur in a sale agreed upon by his *cestuis que trust*, until he had been furnished with deeds, &c., relating to another and an independent trust, and to which the Court held he was not entitled. He also refused to retire from the trusts to facilitate the sale. Upon a bill by the other trustees and the persons beneficially interested, he was removed from the trusts and ordered to pay the costs of the suit. *Palairiel v. Carew.*      564

**CONSULTATION.**

*See Costs, 5.*

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3. The Defendants advertised that offers would be received for old Portland stone of Westminster Bridge. The Plaintiffs made an offer for the stone of a particular quality, which was accepted:— Held, that this was a contract for the purchase of all the stone of that quality. *Ibid.*

*See IMMORAL CONTRACT.*

**MARRIAGE CONTRACT.**

**SETTLEMENT, 1.**

**SPECIFIC PERFORMANCE, 2, 3, 4.**

**CONTRIBUTORY.**

*See WINDING-UP, 5.*

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cumulations as personal estate.  
*Dixie v. Wright.*      Page 662

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### CORPUS.

*See ANNUITY, 2.*

**TENANT FOR LIFE AND REMAINDERMAN, 1.**

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of those disallowed apportioned and set-off. *Dally v. Workham.*  
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6. The costs of suit were ordered to be taxed as between solicitor and client, and paid out of the trust funds. It was held, that the costs of a consultation with Queen's Counsel, as to the frame of the bill, ought to be allowed, notwithstanding, by his advice, a part of the relief sought by the draft bill was abandoned, and never became the subject of the suit. *Forster v. Davies.* Page 624

7. An estate was devised for sale and a portion undisposed of descended on the heir. Held, that the costs of a suit to administer the real estate fell on the devisees and heir *pari passu*. *Maddison v. Pye.* 658

*See LANDS CLAUSES ACT, 1.*

TAXATION.

TENANT FOR LIFE AND RE-MAINDERMAN, 1.

TRUSTEE RELIEF ACT.

## COURT OF PROBATE.

*See CHARGE.*

## COVENANT.

1. A covenant not to carry on the trade of horse-hair manufacturer within 200 miles of *Birmingham*, held valid. *Harms v. Parsons.* 328
2. A covenant, on the purchase of the business of horse-hair manufacturers, not to carry on the trade of horse-hair manufacturer, construed to prevent the covenantor from the buying and selling manufactured horse-hair. *Ibid.*

*See COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.*

## COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.

1. A covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of disposition. *Coventry v. Coventry.*

Page 612

2. Covenant by husband and wife to settle all after-acquired property, "not being already settled for her separate use:" Held, not to bind property subsequently bequeathed to the wife for her separate use. *Ibid.*

*See SETTLEMENT, 2.*

## CROSS BILL.

*See MISTAKE.*

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## DAMAGES.

In a case for an injunction, which, from circumstances arising after the bill was filed, could not be granted, the Court, under Sir H. Cairns' Act (21 & 22 Vict. c. 27, s. 2) awarded damages, though not specifically prayed for by the bill. *Catton v. Wyld.* 266

## DEBT.

*See INTEREST, 2.*

**DEED.***See ANNUITY, 3.***REFERENTIAL TRUSTS.****REFORMING DEED.****SETTLEMENT, 2.****VOLUNTARY DEED.****DEMAND IN WRITING.***See FRIENDLY SOCIETIES ACT, 1.***DEMONSTRATIVE LEGACY.**

A testatrix, after stating that she was desirous of leaving certain legacies, requested her supposed husband to pay certain legacies out of his own estate. He predeceased her. Held, that the legacies were demonstrative and payable out of the testatrix's estate. *Jones v. Southall.* (No. 2.) Page 31

**DEMURRER.***See INSURANCE, 2.***NEW TRUSTEE.****REGISTRY OF DESIGN, 1.****DESCRIPTION OF LEGATEE.**

By his will, a testator gave his real and personal estate to trustees on trusts for his sister. By a codicil he gave a legacy to his eldest nephew, whom he called his "heir at law," and he directed that the codicil should not give to his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds; but that the same, as to freeholds, should descend to his heir at law, and as to customary estates, to his customary heir. At the testator's death, his

sister was his heiress at law and customary heir. Held, that she was not excluded from taking by descent the after-acquired copyholds. *Gould v. Gould.* Page 391

**DESIGN.***See COPYRIGHT OF DESIGN.***REGISTRY OF DESIGN.****DEVISE.**

Devise of all the freehold and real and leasehold estates in the counties of *Lincoln* and *Cambridge* (except such as I have hereinbefore disposed of) "and all the leasehold lands" at *S.*, in the "county of *Dorset*, and elsewhere, which I can dispose of by this my will." Held, that it passed freeholds in *Norfolk* and elsewhere wherever situate. *Pinney v. Sir William Marriot.* 643

*See CONVERSION.***WILL and its references.****DISCOVERY.***See AFFIDAVIT OF DOCUMENTS.***EXCEPTIONS.****PRIVILEGE.****DISCRETION.***See DISCRETIONARY TRUST.***PREDATORY TRUST.****DISCRETIONARY POWER.**

Bequest to trustees to apply the income or principal for the benefit of *S. J.*, widow, and of her three children, in such proportions, &c., as the trustees, in their absolute

discretion, should think proper; but in case *S. J.* married again, her interest to cease. The trustees declined to act. Held, that the fund must be divided equally between *S. J.* and her three children. *Izod v. Izod.* Page 242

## DISCRETIONARY TRUST.

1. A testator bequeathed a legacy to his widow, "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit, being convinced that it will be disposed of conscientiously and properly by her for the purposes mentioned, recommending her not to diminish the principal." The widow appointed the capital between the children very unequally. The Court (one child opposing) refused to part with the fund or to declare the right during the life of the widow. *Hart v. Tribe.* (No. 4.) 279

2. Bequest to a widow "to be applied by her for the payment of my lawful debts, and the residue for her own use and benefit and that of our infant daughter." Held, that this was not a discretionary trust, but that they were equally entitled. *Bibby v. Thompson.* (No. 1.) 646

*See PRECATORY TRUST.*

## DISMISSAL FOR WANT OF PROSECUTION.

*See NOTICE OF MOTION.*

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## ENJOYMENT IN SPECIE.

*See TENANT FOR LIFE.*

## EVIDENCE.

1. The testimony of a claimant alone cannot be acted on, unless there be some corroborative evidence. *Parish v. Parish.* Page 207
2. By the General Orders evidence in a cause is to close within eight weeks after issue joined, but a witness who has made an affidavit may be cross-examined within one month after such eight weeks. A Defendant may move to dismiss, if the Plaintiff does not set down the cause "within four weeks after the evidence closed." Held, in a case where there was no cross-examination, that the evidence closed at the end of eight weeks, and not of twelve weeks. *Hart v. Roberts.* 231

3. Evidence of the notoriety of a fact in a neighbourhood rejected. *Wentworth v. Lloyd.* 467

*See CONTRACT, 1.*

MARRIAGE CONTRACT.

PARENT AND CHILD.

PAROL EVIDENCE.

## EXCEPTIONS.

A bill was filed by the next of kin against *A. B.*, the administratrix, and *C. D.*, who was the partner and executor *de son tort* of the intestate, for the administration of the estate and to take the partnership accounts:—Held that *C. D.*, who had not demurred, was bound to

set out the partnership accounts.  
*Leigh v. Birch.*              Page 399  
*See Costs, 1.*

#### EXECUTORS.

1. An executor, who allows his testator's estate to become insolvent, by keeping an account at a banker's at compound interest, will not be allowed the accumulated interest in passing his accounts. *Bate v. Robins.*              73
2. An executor voluntarily confessed judgments, which he paid, and afterwards, in an administration suit, the assets were insufficient to pay the remaining debts. Held, that the executor was still entitled to priority for his costs of suit. *Sanderson v. Stoddart.*              155
3. A testator died in *August, 1861*, and his executors remitted to their solicitor 80*l.* to obtain probate and 25*l.* to pay legacy duty. The solicitor became bankrupt in *November, 1861*, and the money was lost. The Court allowed the executors the 80*l.*, but not the 25*l.*, the latter advance being premature, the legacies not having yet (1863) been paid. *Castle v. Warland.*              660

*See STATUTE OF LIMITATIONS, 1.*

#### EXECUTOR DE SON TORT.

*See EXCEPTIONS.*

#### FAMILY TRUSTS.

*See DISCRETIONARY TRUST.*  
*PRECATORY TRUST.*

#### FARMING STOCK.

A farmer bequeathed "the whole of the consumable and other provisions, farming stock and effects, farming implements, growing crops and tenant right" in or upon his dwelling-house and farm at his death to trustees, to carry on the farm "until the 6th of April next subsequent to or following the time of his decease," and after that day, to transfer "the consumable and other provisions, farming stock and effects," &c. then upon his house and farm to his son. He declared that his trustees were not to sell the "farming stock and effects" except in the ordinary course of management of the farm, and that the money produced thereby should fall into his residue. The testator died about four o'clock on the 5th April, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn and wool of the last year's produce, and an excess of fat sheep and stock of the value of 3,314*l.* Held, that these passed to the son. *Harvey v. Harvey.*

Page 441

#### FEME COVERT.

*See HUSBAND AND WIFE.*  
*SEPARATE USE.*

#### FINES AND RECOVERIES ACT.

*See SEPARATE USE, 1, 2.*

#### FORECLOSURE.

*See ABSENT PARTIES.*  
*MORTGAGE.*

## FORFEITURE.

In 1852, *A. B.* voluntarily covenanted to pay an annuity to *C.D.* until she "should do any act whereby the same or any part thereof should be vested or become liable to be vested in any other person." She married in 1859, but it did not appear that the husband had, in any way, interfered with the annuity. Held, that, by the marriage alone, she had not forfeited the annuity. *Bonfield v. Hassel.* Page 217  
*See INSURANCE, 3.*

## FRAUD.

*See HUSBAND AND WIFE, 1, 3.  
WINDING-UP, 5.*

## FRIENDLY SOCIETIES ACT.

1. The Friendly Societies Act (18 & 19 Vict. c. 63, s. 23) requires the assignees, &c. of the officers of such societies "upon demand in writing" to pay the debts due from such officers in priority of his other creditors:—Held, that a bill filed to recover the amount is a sufficient "demand in writing." *Absalom v. Gething.* 322
  2. The priority over other creditors, which is given to friendly societies for debts due to them from their treasurer, &c. is not lost by their neglecting, for some time, to make him give the security required by their rules and by statute, nor by their neglect to audit his accounts. *Ibid.*
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## GENERAL ORDERS.

- 1.—14TH CONSOLIDATED, RULE 9. The 9th rule of the 14th Consolidated Order does not enable a Defendant who has answered the original bill to plead to it after amendment, where it still raises the same issue. *Ellice v. Roupell.* (No. 1.) Page 299
- 2.—22ND CONSOL. ORD. ART. 2. R. 11. A decree for foreclosure was made against a *cestui que trust*, and the bill was taken *pro confesso* against his trustees. The decree was served on the trustee, but without the necessary notice. After the expiration of three years, the Court dispensed with service of the decree on the trustee altogether, and made it absolute against him. *Thurgood v. Cane.* 156

- 3.—73RD OF 11TH NOVEMBER, 1862.  
*See EVIDENCE, 2.  
WINDING-UP, 2.*
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## HEIR.

*See DESCRIPTION OF LEGATEE.*

## HEIR AND DEVISEE.

*See Costs, 7.*

## HEIR AND NEXT-OF-KIN.

*See CONVERSION.*

## HEIRLOOMS.

A testator devised his freeholds to the first and other sons of *A.* (who was living and unmarried) successively in tail, with remainder to *B.* for life, with remainder to *B.*'s first and other sons successively in tail, &c. And he bequeathed his plate to *B.* for life, and after her decease, he gave the same "in the nature of an heirloom to the person, who, for the time being, should be in the actual possession and enjoyment of his freehold estates under the limitations of his will." In the lifetime of *A.*, *B.* and her eldest son executed a disentailing deed. *A.* survived both *B.* and her eldest son, and he died without having been married. At *A.*'s death, *C.* was the issue in tail of *B.*, but was not in possession of the freehold. Held, that there had been no failure of the gift of the plate, and that *C.*, and not the representatives of *B.*, were entitled to it. *Hogg v. Jones.* Page 45

## HUSBAND AND WIFE.

1. A settlement, made by a woman pending an engagement and seven weeks before her marriage, without the knowledge of her intended husband, and in favor of persons for whom she was under no legal or moral tie to provide, was set aside as a fraud on the husband's marital right. *Downes v. Jennings.*

290

2. A delay of two years and a-half after knowledge in taking proceedings to set aside a deed as a fraud

on the marital rights, held not sufficient to deprive the husband of his right to relief. *Downes v. Jennings.* Page 290

3. Assuming that in *Hunt v. Matthews* (1 Vern. 408) the settlement was made after the treaty of marriage, it is difficult to reconcile it with Lord Thurlow's observations in *Strathmore v. Bowes* (1 Ves. jun. 28). *Ibid.*
4. Estates of a husband were settled on the husband for life, with remainder to such uses as the husband and wife should appoint for raising money by mortgage, and in default to the wife for life, with remainder to the husband and wife in equal moieties. The husband and wife executed the power, for the purpose of raising money for the use of the husband:—Held, that the wife's estate could not be considered as surety for the husband's debt, and that she had no equity to have the whole mortgage money paid out of the husband's moiety alone. *Scholefield v. Lockwood.* (No. 1.) 434

5. A husband deserted his wife immediately after her marriage in 1846, and she was supported by her sister. In 1848, an annuity was bequeathed to her for her life, which the trustee accumulated until 1862, when the wife obtained a decree for a judicial separation. In 1863, the Court, on the petition of the wife and her sister, ordered the whole accumulations, amounting to 1,315*l.* Stock, to be paid over to the sister

to the exclusion altogether of the husband. *Re Ford.* Page 621  
*See COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.*

**MARRIAGE CONTRACT.**

**SETTLEMENT.**

**SEPARATE USE, 1, 2, 3.**

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### IMMORAL CONTRACT.

A daughter joined her father in covenanting to surrender a copyhold, by way of mortgage, to *A. B.* for a sum of money lent by him to the father. Part of the consideration was the permission of the father to allow *A. B.* to continue his visits to the daughter, whom he was seducing, or had seduced. Upon a bill to enforce the deed and a cross bill to cancel it, the Court at first considered that it could not interfere for either party, but ultimately ordered the deed to be cancelled, and that *A. B.* should pay the costs of both suits, except those of the father. *W— v. B—. B— v. W—.* 574

### INCOME TAX.

Though in dealings between merchants, in discounting bills and the like, and in loans made for short periods, the income tax is not deducted, yet, in a mortgage transaction, the mortgagor is entitled to deduct it. *Mosse v. Salt.*

269

### INDEMNITY.

*See PRINCIPAL AND SURETY, 1.  
SPECIFIC PERFORMANCE, 1.*

### INFANT.

After decree in a suit instituted by several infants, one came of age and objected to remain co-Plaintiff. His name was struck out as co-Plaintiff and he was made a Defendant. *Bicknell v. Bicknell.*

Page 381

*See PARTITION.*

### INJUNCTION.

*See LETTERS.  
NEW TRUSTEE.*

### INSURANCE.

1. Some shipowners joined in a club, and provided for the mutual insurance of their respective vessels. Held, that this was not an illegal association under the 35 Geo. 3, c. 63; but whether it is necessary to have a policy in such cases, *quære.* *Bromley v. Williams.* 177
2. By the rules of a shipping insurance club, its affairs were to be managed by the members, assisted by the treasurer and secretary, and the "finance committee" were to sign all cheques and see that the funds were duly appropriated. A ship of a member having been lost at sea, he sued seven of the members and the treasurer and secretary to obtain payment of the loss. There being no finance committee: Held, on demurrer, that these Defendants

had not improperly been made parties. *Bromley v. Williams.*

Page 177

3. By a rule of a shipping insurance club, a fine was imposed on non-payment of the premium for a month after it became due, and at the end of two months, he was to be deprived of the benefit of insurance until the arrears were paid. A member insured his ship, which was lost at sea after the premium became due but before the expiration of the month. Whether, on subsequently paying the premium, the member was entitled to the sum insured, *quære. Ibid.*

### INTEREST.

1. A bankers' account was kept at compound interest. In 1847, the customer gave the bankers a security for all moneys then due or thereafter to become due, "with interest for the same after the rate of 5*l.* for every 100*l.* by the year." In 1855, the customer assigned all his estate to trustees for the benefit of his creditors, and his banking account ceased. Held, that, under this security, the bankers were entitled to compound interest down to the date of the creditors' deed, but to simple interest only afterwards. *Crosskill v. Bower. Bower v. Turner.* 86

2. As between tenant for life and remainderman, the interest on the testator's debts must be borne by the income as from the day of his death. *Barnes v. Bond.* 653

3. A testatrix directed a church to be built, and as soon as built she gave 5,000*l.* for the endowment of the minister, "but without any interest in the meantime." The building of the church was delayed several years by litigation, and no minister had been appointed. The Court declined to decide, in the absence of the minister, whether any interest was payable on the legacy, but intimated that interest before an appointment of minister would not form part of the capital. *Fisher v. Brierley.* (No. 4.) Page 602
4. A purchaser is liable to pay interest on his purchase-money from the time when he could prudently take possession; but held, that he could not prudently take possession at the time a good title was shown, if he had no assurance that a person having a charge on the property would join in the conveyance. *Wells v. Maxwell.* (No. 2.) 550
5. As to the time from which interest is chargeable against a tenant for life who commits waste. *Bagot v. Bagot. Legge v. Legge.* 509  
See BANKER, 1.

### COMPOUND INTEREST.

### EXECUTORS, 1.

### " ISSUE " CONSTRUED " CHILDREN."

1. A testator bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their "issue," if there should be any

"children" to take their parents' share. But in case the nephew or niece died "without issue, or leaving such they should die under twenty-one without issue," then he gave his or her share to the other of them or his or her issue "if he or she be then dead leaving issue as aforesaid." The niece died in 1811, leaving issue; the nephew died in 1862, leaving no issue. Held, that "issue" in the first part of the will meant "children," but in the latter part "issue generally," and that on the death of the nephew, all the issue of the niece *then* living took *per capita*. *Re Corrie's Will.*

Page 426

2. Devise to *A.* for life, and after her decease to her "lawful issue" then living and the "children" of such of them as should be then dead, in equal shares, the children of such issue to take their "parent's share." Held, that the word "issue" was to be construed "children," and that the children of *A.* and the children of *A.*'s children who predeceased her took for life only. *Fairfield v. Bushell.* 158

#### JOINT TENANCY.

1. The several receipts by joint tenants of a portion of a trust fund does not destroy the joint tenancy as to the remainder of the fund. *Leak v. Macdonall.* 28
2. A testator gave the residue of his real and personal estate to his nephews and nieces living at his

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death. But if any should be then dead, their offspring were to be considered to stand in the place of their parents and to take "the same benefit." Held, that though the nephews and nieces took as tenants in common, their offspring took as joint tenants. *Leak v. Macdonall.* Page 28

#### JUDGMENT.

*See EXECUTORS, 2.*

#### JUDICIAL SEPARATION.

*See HUSBAND AND WIFE, 5.*

#### JURISDICTION.

*See WINDING-UP, 1, 4.*

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#### LACHES.

*See HUSBAND AND WIFE, 2.*

#### LAPSE OF TIME.

#### LANDS CLAUSES ACT.

(8 & 9 VICT. c. 18, s. 80.)

1. Upon an application by a tenant for life to pay to a mortgagee the amount of compensation money which was in Court: Held, that the company was not bound to pay the mortgagee's costs of appearing. *Re Hatfield's Estate.* (No. 2.) 252
2. An existing railway company was authorized by an act to make some extensions and new works on their line, and "for the purposes of the works by the act authorized and

Y Y

the general purposes of their undertaking," the company might raise, by the creation of new shares, any sum not exceeding 100,000*l.* The Lands Clauses Consolidation Act, 1845, was incorporated in the special act, "save so far as the clauses and provisions thereof respectively were expressly varied or excepted by this act." Held, that the 16th section of the Lands Clauses Act (8 & 9 Vict. c. 18), which requires the whole capital to be subscribed before the compulsory powers of taking land is put in force, was inapplicable to the new act. *Weld v. The South Western Railway Company.*

Page 340

*See Costs, 3.*

## LAPSE OF TIME.

*A. B.*, a trustee, misapplied a trust fund of which he was tenant for life, and he died in 1834. *C. D.*, who then became entitled to it, died in 1858, having taken no proceeding to recover it. A bill, filed in 1863 by the representatives of *C. D.* against the representatives of the representative of *A. B.*, to recover the fund, was dismissed with costs, on the ground of the lapse of time. *Hodgson v. Bibby.*

221

*See HUSBAND AND WIFE, 2.**WINDING-UP, 5.*

## LEASEHOLDS.

*See TENANT FOR LIFE AND RE-MAINDERMAN, 2.*

## LEGACY.

*See ADEMPTION.**BEQUEST.**DEMONSTRATIVE LEGACY.**FARMING STOCK.**INTEREST, 3.**WILL and its references.**WINE.*

## LEGAL ESTATE.

*See PRIORITY.*

## LEGATEE.

Bequest to the testator's grandchildren and nephews and nieces. The testator had no brothers and sisters, and therefore no nephews and nieces: Held, that the nephews and nieces of his wife were entitled. *Hugg v. Cook.*

Page 641

## LETTERS.

Where the solicitor of a company writes a letter apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard v. Gunn.*

462

## LIEN.

*See SHIP.**TRUSTEE AND CESTUI QUE TRUST.*

## LIFE INTEREST.

*See "ISSUE" CONSTRUED "CHILDREN" 2.*

## LIGHTS.

*See ANCIENT LIGHTS, 1, 2.*

**LIS PENDENS.**

A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into the validity of the Plaintiff's claim. *Bull v. Hutchens.*

Page 615

**LIVING.***See SEQUESTRATION.***LUNATIC.***See TRUSTEE, 4.***MARRIAGE CONTRACT.**

Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, viz., to allow *Elizabeth* 100*l.* a-year, . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of." Held, 1st. That this was a contract binding on the father; 2nd. That it was not so vague as to prevent its being enforced; 3rd. That it did not include freehold property; 4th. That the daughter was entitled to an equal share with the other children of the personal estate which the testator died possessed of, after deducting the widow's one-third share and the debts and expenses; 5th. That parol evidence was inadmissible to

shew what was intended by the words "her share;" 6th. That the suit ought not to be by the daughter alone, but that her husband ought to be a Plaintiff. *Laver v. Fielder.*

Page 1

*See SETTLEMENT, 1.***MERGER.**

1. Where a charge on an estate becomes vested absolutely in the owner of the inheritance of the estate, the three tests usually applied for ascertaining whether the charge has merged are:—First, whether there has been an actual expression of intention to that effect; secondly, whether the acts done by the owner of the estate are only consistent with the charge being kept on foot; and thirdly, whether it is for the interest of the owner that the charge should not merge in the inheritance. *Tyrwhitt v. Tyrwhitt.* 244

2. As to the effect of an expression of intention, on the part of the owner of the inheritance of an estate, as to the merger of a charge thereon, made previous to his becoming absolute owner of the charge. *Ibid.*

3. A fund, which was held in trust for *A.* for life, with remainder to *B.* absolutely, was lent by the trustees (*B.* and *C.*) to *B.*, on mortgage of his fee simple estates. By the mortgage deed, the trustees declared that they would hold the fund, after the decease of *A.*, for " *B.*, his executors, administrators and assigns, for his and

their absolute benefit." *B.* survived *A.* and died. Held, that this was not a sufficient indication of a contrary intention to prevent the merger of the charge in the inheritance. *Tyrwhitt v. Tyrwhitt.*

Page 244

#### MINES.

1. It is a question of degree, to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not. *Bagot v. Bagot.*  
*Legge v. Legge.* 509
2. *Semble,* that a mine, the working of which had been discontinued for twenty or thirty years, in consequence of its not having been remunerative, might, after that time, be worked by a succeeding tenant for life; but a mine, where the working of which has been abandoned by the owner of the inheritance for the advantage of the property, cannot be worked by a succeeding tenant for life. *Ibid.*

#### MISTAKE.

A property, which was subject to a mortgage of 1,400*l.*, was settled by a deed, which erroneously stated that it was subject to a mortgage of 1,200*l.* The error being clearly proved, the Court, as between the parties claiming under the settlement, and under the peculiar circumstances, treated the estate as subject to 1,400*l.*, without a cross bill to rectify the settlement. *Scholefield v. Lockwood.* (No. 2.) 436

#### MORTGAGE.

A decree for foreclosure or for sale cannot be made in the absence abroad of a party entitled to one-third of the equity of redemption. The objection is not removed by the 15 & 16 Vict. c. 86. *Caddick v. Cook.* Page 70

*See GENERAL ORDERS.*

HUSBAND AND WIFE, 4.

MORTGAGEE IN POSSESSION.

NOTICE.

PRINCIPAL AND SURETY, 1, 3.

VOLUNTARY SETTLEMENT, 1.

#### MORTGAGEE IN POSSESSION.

Where the liability of a mortgagee in possession to account without annual rests once begins, it continues until changed by some further agreement come to between the mortgagor and mortgagee. *Scholefield v. Lockwood.* (No. 3.)

439

#### MORTGAGOR AND MORTGAGEE.

*See TAXATION, 5, 9, 10.*

#### MORTMAIN.

Trustees had a discretionary power of investing a residue either on government or "real securities," and to alter or vary the investment. *A. B.*, who, subject to a prior life estate, was absolutely entitled, gave the fund to charity, both by deed not enrolled and by her will, and she died in the life of the tenant for life. The fund had always been invested in the

public funds. Held, that, notwithstanding the Mortmain Act, the gift to the charities was valid. *Re Beaumont's Trusts.* Page 191

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**NEPHEWS AND NIECES.**

*See LEGATEE.*

**NEW TRUSTEE.**

A tenant for life, with power to appoint new trustees, parted with the whole of his interest in the settled property. He afterwards appointed two improper persons to be trustees. Upon a bill to remove such trustees, and also to administer the trusts and to make the tenant for life pay the costs:— Held, on demurrer by the tenant for life, that he had properly been made a party. *Raikes v. Raikes.*

403

**NOTICE.**

Bankers advanced to customers £300l. to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated, that they had been requested by their "principal" to extend the term of the loan on the stock. The stock actually belonged to a third party, *A. B.* :—Held, that, after the receipt of this letter, the bankers had constructive notice of *A. B.*'s

right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock. *Locke v. Prescott.*

Page 261

*See PRINCIPAL AND AGENT, 1.*

**REVERSION.****VENDOR AND PURCHASER.****NOTICE OF MOTION.**

A notice of motion to dismiss for want of prosecution is irregular if served prior to the Plaintiff's being in default, although at the time when the motion is heard the Plaintiff is in default. *Ponsardin v. Stear.*

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**OFFICIAL LIQUIDATOR.**

*See WINDING-UP, 3.*

**OFFSPRING.**

A testator gave the residue of his real and personal estate to his nephews and nieces living at his death. But if any should be dead, their offspring were to be considered to stand in the place of their parents, and to take "the same benefit." Held, that though the nephews and nieces took as tenants in common, their offspring took as joint tenants. *Leak v. Macdowall.*

28

**OVERSEERS.**

*See COLLECTOR.*

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**PARCELS.***See Devise.***PARENT AND CHILD.**

When a father purchases in the name of his child, his declarations of intention contemporaneous with the transaction itself are alone admissible to prove a trust. *Williams v. Williams.*      Page 370

*See Ademption.***ADVANCEMENT.****PARISH.***See Charity, 3.***COLLECTOR.****PAROL EVIDENCE.**

Parol evidence is admissible to prove that lands were purchased by a father in the name of his child not as an advancement but as a trustee. *Williams v. Williams.*      370

*See Marriage Contract, 2.***PARENT AND CHILD.****PARTIES.**

As to the modern practice of making several of a numerous class represent the class both as Plaintiffs and Defendants. *Bromley v. Williams.*      177

*See Absent Parties.***INSURANCE, 2.****INTEREST, 3.****MARRIAGE CONTRACT.****MORTGAGE.****PARTITION.**

An infant being entitled to one-ninth of a real estate, and it being for her benefit, the Court, instead of

directing a partition, declared the costs a charge on the infant's share, and ordered a sale of the whole estate. *Davis v. Turvey.*

Page 554

**PARTNER.***See Exceptions.***PARTNERSHIP.****PARTNERSHIP.**

1. Where partners, after the expiration of the term agreed upon by the articles of co-partnership, continue to carry on the business at will, without change, this partnership is regulated by the articles, so far as they are applicable to the new state of circumstances, but such of the articles as are inconsistent with a partnership at will have no application. *Clark v. Leach.*      14

2. By articles for a partnership for seven years, a partner, upon certain default of his co-partner, had power to dissolve, and thereupon the defaulting partner was to be considered as quitting the business for the benefit of the partner giving the notice, who was to have the option of taking the property and effects of the partnership at a valuation. Held, that this clause did not apply to a partnership continued at will after the expiration of the seven years. *Ibid.*

3. As to the proper mode, in the absence of any agreement expressed or implied, of taking the partnership accounts of bankers, as between a surviving partner

and the estate of the deceased partner. *Bate v. Robins.*

Page 73

### PART PERFORMANCE.

*See SPECIFIC PERFORMANCE, 2, 3, 4.*

### PATENT.

1. Whether, upon a bill to restrain the infringement of a patent, it is necessary to allege that the patentee has duly paid the instalments of stamp duties necessary to keep the patent alive, under the 16 & 17 Vict. c. 5, s. 2, *quære?* *Sarazin v. Hamel.* (No. 1.) 145

2. Hoops of whalebone, cane and other substances, suspended from the waist and forming a petticoat, had long since been used by ladies. The Plaintiffs took out a patent for using, for the same purpose, hoops made of steel watch springs. Held, that this was not an invention which could properly be made the subject of a patent. *Thompson v. James.* 570

*See COPYRIGHT OF DESIGN.*

### REGISTRY OF DESIGN.

### PAYMENT INTO COURT.

1. A large balance was found due from the legal personal representatives, but it appeared that the amount had been received under orders in another suit by their solicitor, who retained it to satisfy large claims he had against his clients. The cause coming on for further consideration, and on a petition of the Plaintiff, the soli-

citor was ordered to pay the amount into Court. *Bibby v. Thompson.* (No. 2.) Page 647

2. Trustees authorized a firm of solicitors (one of whom, *W.*, was a trustee) to draw the trust funds out of a bank. *W.* drew it out and misapplied it. The trustees were, on interlocutory application, ordered to pay the amount into Court. *Ingle v. Partridge.* 661
3. Three trustees sold out trust funds, and the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into Court. *Ibid.*

### PAYMENT OUT OF COURT.

1. Liberty given to apply at Chambers in respect of the shares of infants amounting to 379*l.* each, in an undivided fund. *Winkworth v. Winkworth.* 233

2. Money settled to the separate use of a married woman is paid out of Court without any personal examination. *Lechmere v. Brotheridge.* 353

3. Moneys are never paid out of Court to an administrator *ad litem.* *Williams v. Allen.* (No. 2.) 650

### PER CAPITA.

*See "ISSUE" CONSTRUED "CHILDREN" I.  
PER STIRPES.*

### PERPETUATING TESTIMONY.

*See BILL TO PERPETUATE TESTIMONY, I.*

**PER STIRPES.**

Bequest to the descendants of the brothers and sisters of the testator's grandfather, in equal shares, *per stirpes* and not *per capita*. There were two sisters. Held, that the fund was divisible, in the first instance, into moieties, and that one belonged to the descendants of one sister *per capita*, and that the other moiety similarly to the descendants of the other. *Robinson v. Shepherd.* Page 665

**PETITION.**

The Petitioner having refused to file the original petition, it was ordered that the Respondent be at liberty to file a copy, and that the Petitioner do pay the Respondent his costs of the application. *Re Devonshire.* 241

*See TAXATION, 5.*

**PLAINTIFF.**

*See INFANT.*

**PLEA.**

The Plaintiffs filed a bill to perpetuate testimony, on the ground that the matters in dispute with the Defendants could not then be made the subject of judicial investigation. The Defendants answered, and the Plaintiffs then amended the bill in immaterial matters. The Defendants then pleaded, that, since the answer, the Plaintiffs had themselves filed another bill, raising the point in dispute, and showing that the mat-

ters in question could now be made the subject of judicial investigation:—Held, that the plea could not be sustained, and that, if at all, it ought to have been pleaded in the first instance. *Ellice v. Roupell.* (No. 1.) Page 299  
*See GENERAL ORDERS, 1.*

**PLEADING.**

*See ABSENT PARTIES.*

**BILL TO PERPETUATE TESTIMONY.**

**INSURANCE, 2.**

**MARRIAGE CONTRACT.**

**PARTIES.**

**PATENT, 1.**

**PLEA.**

**REVIVOR.**

**POLICY.**

*See INSURANCE.*

**POWER.**

1. *A. B.* bequeathed her residue to such person as *C. D.* should, by deed or will, appoint, and in default to his next of kin. *C. D.* died in the life of *A. B.* Held, that his will could not operate as an execution of the power under the 1 Vict. c. 26, s. 27, and that his next of kin were entitled to *A. B.'s* residue. *Jones v. Southall.* (No. 2.) 31

2. A voluntary settlement in favor of several persons contained a power authorizing the tenant for life (a volunteer) to revoke the trusts of the property and again resettle the same upon such trusts as to her should seem meet. Held, that this general power could not

be controlled, and that an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power. *Meade King v. Warren.* Page 111

3. *A.*, having a power to appoint 1,000*l.* by will, and which in default of appointment was given over to *B.*, duly appointed it to *C.*, who died in the testator's life. He afterwards made a codicil, giving his residue and the dividends due at his death on the 1,000*l.* to his wife. Held, that under the Wills Act, the 1,000*l.* passed to the wife under the residuary gift. *Bush v. Cowan.* 228

*See DISCRETIONARY POWER.*

**REPUGNANCY.**

### PRACTICE.

*See ABSENT PARTIES.*

**AFFIDAVIT OF DOCUMENTS.**

**AMENDMENT.**

**BILL TO PERPETUATE TESTIMONY, 1.**

**COSTS.**

**EVIDENCE, 2.**

**GENERAL ORDERS, 2.**

**INFANT.**

**NOTICE OF MOTION.**

**PARTIES.**

**PARTITION.**

**PAYMENT OUT OF COURT.**

**PETITION.**

**REVIVOR.**

**SERVICE OUT OF JURISDICTION.**

**TAXATION, 5, 9.**

**TRUSTEE ACT.**

**WINDING-UP, 2, 5.**

### PRECATORY TRUST.

A testator gave the residue of his personal estate to his wife, "for her own absolute use and benefit, in the fullest confidence that she would dispose of the same for the benefit of her children, according to the best exercise of her judgment and as family circumstances might require at her hands." Held, that the widow was entitled for life, with a precatory trust in remainder in favor of her children. *Shovelton v. Shovelton.* Page 143

### PRESUMPTION.

*See MERGER, 1, 2, 3.*

### PRINCIPAL AND AGENT.

1. A bill to set aside a purchase of property by an agent dismissed with costs, it being proved that the Plaintiff had distinct notice, at the time, that the agent was one of the beneficial purchasers, and the vendor not having instituted a suit for six years. *Wentworth v. Lloyd.* 467

2. On questions as to the extent of the authority of an agent, the same rules of law and equity apply to boards and public companies as individuals. *Thorn v. The Commissioners of H. M. Works and Public Buildings.* 490

### PRINCIPAL AND SURETY.

1. *A.* was tenant for life of lots 1 and 2, to which *B.* was entitled in remainder. *B.*, and *A.* as his surety, mortgaged lot 2, *B.* alone covenanting to pay. By a contempo-

~~CONFIDENTIAL~~

## RECOUPING.

*See TRUSTEE AND CESTUI QUE TRUST.*

## REFERENTIAL TRUSTS.

By a settlement, trustees were to raise 2,000*l.* for *A.* for life, with remainder to her children, with powers for maintenance, advancement "or otherwise," and in default of children the fund was given to *C.* A like sum was given to *B.* for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed, in respect to the 2,000*l.* given to *A.* and her children, "and otherwise in like manner, to all intents and purposes, as if such trusts and provisions were there fully repeated." Held, that this included the gift over to *C.*, and that on the death of *B.* without children, *C.* was entitled to the second sum of 2,000*l.* *Re Shirley's Trusts.* Page 394

*See HEIRLOOMS.*

REMOTENESS.

## REFORMING DEED.

If a voluntary deed fail to carry into effect the intentions of the parties, it cannot be reformed, except with the consent of the donor. *Phillipson v. Kerry.* 628

*See MISTAKE.*

## REGISTRY OF DESIGN.

1. By the Copyright of Design Act (5 & 6 Vict. c. 100, s. 4), no person is to have the benefit of

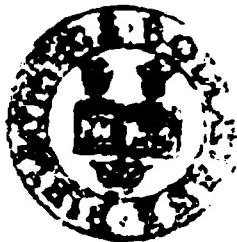
the act, unless every article has attached thereto the letters "Rd." A bill to prevent an infringement did not allege that this had been done. Held, that the bill was not, on that ground alone, open to a demurrer. *Sarazin v. Hamel.* (No. 1.) Page 145

2. The copyright of a registered design is lost, if the proprietor (English or foreign) sell the registered article abroad without the letters "Rd" being attached thereto, as required by the 5 & 6 Vict. c. 100, s. 4. *Sarazin v. Hamel.* (No. 2.) 151

*See COPYRIGHT OF DESIGN.*

## REMOTENESS.

A testator devised real estates to trustees, to the use of *A.* for life, with remainder to his first and other sons successively in tail, with remainder to *B.* for life, with remainder to his first and other sons in tail, &c. And he bequeathed his personal estate to the same trusts, estates, &c., "or as near thereto as the rules of law and equity would admit." Provided nevertheless, that the personal estate should not "vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years." Held, by the Master of the Rolls, that the gift of the personalty was too remote; but the Lord Chancellor held, that the proviso only applied to tenants in tail taking by purchase. *Gosling v. Gosling.* 58



## RENEWAL.

*See TENANT FOR LIFE AND RE-MAINDERMAN, 2.*

## REPUGNANCY.

A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills. Held, that they took absolute vested interests, and not a life interest, with a power to bequeath, and that the gift over was void for repugnancy.  
*Weale v. Olive.*      Page 421

## RESCINDING CONTRACT.

*See VENDOR AND PURCHASER.*

## RESETTLEMENT.

*See POWER, 2.*

## RESIDUE.

The testator gave all his real and personal estate to trustees, upon trust, except as to money due to him from *A. E.*, to convert by sale and invest in the funds, "and pay the interest thereof unto his wife" for life, with remainder over:—Held, that the widow was entitled to the interest arising from the debt from *A. E.* *Dobson v. Banks.*      259

*See POWER, 3.*

## RESTRAINT OF TRADE.

*See COVENANT, 1.*

## REVERSION.

*A. B.* sold to *C. D.* a life interest in possession (subject to a mortgage for 800*l.*) and a reversionary interest in two sums of money. The price paid for the whole was 75*l.*, and within a month *C. D.* sold it for 125*l.* to *E. F.*, who, within three months afterwards, sold it to *G. H.* for 550*l.* The value of the property in possession (free from the mortgage) was 1,331*l.*, and of the property in reversion 312*l.* The purchase was set aside as against *G. H.* (who was held to have notice), on the ground of its being a purchase of a reversion at an undervalue. *Nesbitt v. Berridge.* *Buller v. Berridge.*

Page 282

## REVIVOR.

A sole Plaintiff died having devised the estate, which was the subject of the suit. Held, that the devisee was not entitled to the common order to revive under the 15 & 16 Vict. c. 86, s. 52. *Laurie v. Crush.*      117

## REVOCATION.

*See POWER, 2.*

## SALE.

*See PARTITION.*

## SCHOOL.

*See CHARITY, 1.*

**SEPARATE USE.**

1. Where a wife has an estate for life in freeholds for her separate use, she can alienate that estate without any acknowledgment under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74). *Leckmere v. Brotheridge.* Page 353
2. But a married woman cannot dispose of her fee simple lands settled to separate use, except by deed duly acknowledged under the Fines and Recoveries Act. *Ibid.*
3. With respect to personal property, whether vested or contingent, settled to the separate use of a *feme covert*, she may deal with it as a *feme sole*, and either sell or encumber it. *Ibid.*

*See HUSBAND AND WIFE, 4.*

**PAYMENT OUT OF COURT, 2.**

**SEQUESTRATION.**

A testatrix, in 1763, bequeathed her residue in trust for the vicar of N. for the time being for ever, he annually preaching a sermon, the same to be paid "in augmentation" of the vicarage. The income had not been paid from 1841 to 1863, and in 1847 a sequestration had issued against the vicar, and he had become insolvent in 1852, but no sequestration had issued upon it. The Court assumed the assent of the ordinary: and held that the gift constituted an augmentation of the living, and not a mere legacy to the vicar for the time being, and that the arrears down to 1847 belonged to the vicar, and the subse-

quent income to the sequestrator. *In re Parker's Charity.* Page 654

**SERVICE OUT OF JURISDICTION.**

On an application to serve a bill out of the jurisdiction, the Court does not require the allegations of the bill to be stated, the Plaintiff must take the order at his own risk. *Brooke v. Morison.* 652

**SET-OFF.**

*See Costs, 1.*

**SETTING ASIDE DEED.**

*See REVERSION.*

**VOLUNTARY DEED, 2.**

**SETTLEMENT.**

1. On *Tuesday*, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on herself," and that the wedding was to take place on *Saturday*. They married unknown to the trustee on *Wednesday*, without any settlement. Held, that this letter contained no settlement or agreement for a settlement binding on the husband or wife. *Beaumont v. Carter.* *Carter v. Beaumont.* 586
2. The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, and all other her share by survivorship or otherwise, and all her right, contingent, rever-sionary or otherwise, possibility,

&c. therein. She afterwards became entitled to a further share by the death of a brother intestate. Held, that it was not included in the settlement. *Edwards v. Broughton.* Page 667  
*See COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY.*

**HUSBAND AND WIFE, 1, 3.**  
**REFERENTIAL TRUSTS.**

### SHIP.

1. If the consignee of a cargo, by agreement with the owner, charter a ship, and expend the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made, and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the shipper of the cargo. *Young v. Neill.* 529
2. *A. B.* chartered nine vessels in *England* to fetch *C. D.*'s timber from *Nova Scotia*, under an agreement between them that he, *A. B.*, was to be the consignee. *C. D.*, in breach of the contract, consigned the cargoes to other persons, but *A. B.* arrested the produce of one of them in the hands of the consignee, by means of an injunction: Held, that *A. B.* could maintain a bill against *C. D.* and the consignee to enforce his lien on the produce of that cargo, and that

such lien extended to all sums properly expended by him in respect of the nine ships and to all pecuniary losses and liabilities, but not to commission, consignee's profits or damages for breach of the contract. *Young v. Neill.*

Page 529

*See INSURANCE, 1, 2, 3.*

### SOLICITOR.

A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the Bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination. *Re Sewell.* 475  
*See SOLICITOR AND CLIENT.*

### SOLICITOR AND CLIENT.

*See EXECUTOR, 3.*

**LETTERS.**

**PAYMENT INTO COURT, 1.**

**PRIVILEGE.**

**TAXATION.**

### SPECIFIC PERFORMANCE.

1. The tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will:—Held, that the purchaser, on waiving the objection as to the charge, was entitled to a specific performance against the representatives of the vendor, but that he

- was not entitled either to an indemnity against the charge or to compensation. *Bainbridge v. Kinnauld.* Page 346
2. Specific performance of a contract partly by parol, though possession had been given and rent paid, refused, on the ground that it would be violating two rules regulating the exercise of the jurisdiction in specific performance; first, that a written agreement cannot be varied by parol; and secondly, that when a parol agreement is sought to be enforced, on the ground of part performance, it must be shewn, plainly and distinctly, what the terms of the agreement are, and that the acts of part performance done are referable to that agreement alone. *Price v. Salusbury.* 446
3. Possession given and payment of rent under one agreement cannot be considered as a part performance of that agreement as substantially varied subsequently. *Ibid.*
4. A written and signed agreement for a lease from the Defendant to the Plaintiff was entered into in June, and possession was given and rent paid. Afterwards, it was discovered that there were errors as to the nature of the tenures and rentals of the property, and in December, a fresh written and signed agreement was entered into. This was afterwards again varied by parol. A bill by the tenant for specific performance of the varied agreement was dismissed by the Master of the Rolls, and on appeal, the Lords Justices disagreeing, the decree was affirmed. *Price v. Salusbury.* Page 446
- See CONDITIONS OF SALE.*
- LIS PENDENS.
- TRUST FOR SALE.
- VENDOR AND PURCHASER.
- STAMP.
- See PATENT, 1.*
- STATUTE.
- The words "unregistered company," in the 25 & 26 Vict. c. 89, s. 199 (2), mean a company not registered under any act, and not a company unregistered under that act. *Re the Torquay Bath Company.* 581
- 13 Geo. 3, c. 3.
- See ALIEN.*
- 33 Geo. 3, c. 63.
- See INSURANCE, 1.*
- 3 & 4 Will. 4, c. 27.
- See STATUTE OF LIMITATIONS, 2.*
- 3 & 4 Will. 4, c. 27, s. 40.
- See LAPSE OF TIME.*
- 3 & 4 Will. 4, c. 74.
- See SEPARATE USE, 1, 2.*
- 6 & 7 Will. 4, c. 34, s. 2.
- See TAXATION, 7.*
- 1 Vict. c. 26, s. 27.
- See POWER, 1, 3.*
- 5 & 6 Vict. c. 100, s. 4.
- See REGISTRY OF DESIGN, 2.*
- 6 & 7 Vict. c. 75.
- See COPYRIGHT OF DESIGN.*

**STATUTE—continued.**

8 &amp; 9 Vict. c. 18, ss. 6, 80.

*See LANDS CLAUSES ACT, 2.*

10 &amp; 11 Vict. c. 96.

*See TRUSTEE RELIEF ACT, 1, 2, 3.*

13 &amp; 14 Vict. c. 60.

*See TRUSTEE, 4.*

15 &amp; 16 Vict. c. 86, s. 52.

*See REVIVOR.*

15 &amp; 16 Vict. c. 86.

*See ABSENT PARTIES.**MORTGAGE.*

18 &amp; 19 Vict. c. 47.

*See WINDING-UP, 7.*

18 &amp; 19 Vict. c. 63, s. 23.

*See FRIENDLY SOCIETIES ACT, 1, 2.*

21 &amp; 22 Vict. c. 27, s. 2.

*See DAMAGES.*

25 &amp; 26 Vict. c. 89.

*See WINDING-UP, 7.***STATUTE OF LIMITATIONS.**

1. After an administration decree, an executor has no right, as against the parties interested in the estate, to give an acknowledgment to take a debt barred by the Statute of Limitation out of its operation. *Phillips v. Beal.* (No. 2.)

Page 26

2. A devise of real estate subject and charged with legacies does not create an express trust in favor of the legatees, and therefore such legacies are barred by the 3 & 4 Will. 4, c. 27, after twenty years, unless there has been some pay-

ment or signed acknowledgment. *Proud v. Proud.* Page 234  
*See LAPSE OF TIME.*

**SUBSTITUTION.**

A testator bequeathed a legacy to such of his nephews and nieces (children of A. B.) as should be living at his death equally, and he provided as follows, that in case any nephew or niece "shall die in my lifetime," leaving children living at my decease, such children should stand in their parents' place and be entitled to the share which the deceased parent would have been entitled to, if living at my decease. A child of a niece who had died prior to the date of the will was held entitled to participate in the legacy. *In re Chapman's Will.*

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**SUBSTITUTIONAL LEGACY.**

A substituted bequest held subject to the same contingency as the original bequest. *Re Corrie's Will.*

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**SURETY.***See HUSBAND AND WIFE, 4.**PRINCIPAL AND SURETY.***"SURVIVORS" CONSTRUED  
"OTHERS."**

1. The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by the testator, in every case

- where it is possible to do so without violating the clear meaning of the rest of the will. *In re Keep's Will.* Page 122
2. The word "survivors" of nieces construed "others," in consequence of the gift over and of the subsequent part of the will referring to the "issue" of a deceased niece participating in an accrued share. *Ibid.*
3. The case of *Wilmot v. Wilmot* (8 Ves. 10) is not overruled by *Winterton v. Crawford* (1 Russ. & Myl. 407). *Ibid.*
4. The word "survivor" cannot be construed as "others," where the gift over is partly to persons whose interests are not given over. *De Garagnol v. Liardet.* 608
5. A testator gave legacies to each of his four daughters for life, with remainder to their children; and he provided, that if either of the daughters should die without children, her share should go over to the survivors of his sons and daughters. Held, that "survivors" could not be read "others," in consequence of the gift over being to a different class from those whose shares were to go over. *Ibid.*
- SURVIVORSHIP.**
- Bequest to *A.*, and at his death (with certain exceptions) to *B.*, and "at her decease" to be divided amongst four named persons, "or as many of them as may be living":—Held, that those only took who survived both *A.* and *B.* *Knight v. Poole.* Page 548
- See "SURVIVORS" CONSTRUED "OTHERS," 4.
- 
- TAXATION.
1. A client paid his solicitor's bill in January; he changed his solicitor two months and-a-half afterwards, and in November following he presented a petition for the taxation of the bill, on the allegation of simple overcharges. The application was refused. *Re Pugh.* 173
2. On a meeting in June to settle a purchase, the solicitor for the first time delivered his bill, and he insisted on payment before completion. It was paid under protest, and in November following a petition was presented for taxation, alleging items of overcharge. The Master of the Rolls ordered a taxation, and his decision was affirmed by the Lords Justices. *Ibid.*
3. An intended mortgagor agreed to pay the reasonable costs of the mortgagee's solicitor, if the matter went off:—Held, that this did not include the expenses of withdrawing the money from a banker's and of remitting it to London for payment. *Re Blakesley and Beswick.* 379
4. Application of a solicitor, after an order for taxation, to withdraw a non-taxable item from his bill, refused. *Ibid.*

- raneous deed, *B.* conveyed his interest in the other lot on trusts to indemnify *A.* as his surety. *A.* paid large sums for interest on the mortgage. Held, that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on lot 1. *Cooper v. Jenkins.* Page 337
2. A surety who pays off a debt for which he became answerable is entitled to all the equities which the creditor could have enforced, and that, not merely against the principal debtor, but also against all persons claiming under him. *Drew v. Lockett.* 499
3. *A.* mortgaged his estate to *C.*, and *B.* became *A.*'s surety for the debt. Afterwards *A.* mortgaged the estate to *D.*, who had notice of the first mortgage. The first mortgage was subsequently paid off, partly by *B.*, the surety, but *D.* got a transfer of the legal estate:—Held, that the surety had still priority over *D.* for the amount paid by him under the first mortgage, as surety for *A.* *Ibid.*  
*See HUSBAND AND WIFE,* 4.

#### PRIORITY.

The priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all. *Sharples v. Adams.* 213  
*See EXECUTORS,* 2.

#### PRIVILEGE.

1. Professional privilege is limited to communications of a solicitor with

his client and with those persons necessarily employed under the solicitor; it does not extend to communications between a solicitor and third parties. *Ford v. Tenant.* (No. 2.) Page 162

2. In a dispute between *A.* and *B.*, the solicitor of *A.* had communications with *B.* Held, that they were not privileged. *Ibid.*

#### PROBATE DUTY.

*See EXECUTORS,* 3.

#### PROOF.

*See CONTRACT,* 1.

#### EVIDENCE.

#### PUBLIC COMPANY.

*See Costs,* 3.

**LANDS CLAUSES ACT.**  
**WINDING-UP.**

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#### QUEEN'S COUNSEL.

*See Costs,* 6.

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#### RAILWAY COMPANY.

*See Costs,* 4.

**LANDS CLAUSES ACT,** 1.

#### REAL AND PERSONAL ESTATE.

*See CONVERSION,* 1, 2.

#### RECEIVER.

*See COLLECTOR.*

## RECOUPING.

*See TRUSTEE AND CESTUI QUE TRUST.*

## REFERENTIAL TRUSTS.

By a settlement, trustees were to raise 2,000*l.* for *A.* for life, with remainder to her children, with powers for maintenance, advancement "or otherwise," and in default of children the fund was given to *C.* A like sum was given to *B.* for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed, in respect to the 2,000*l.* given to *A.* and her children, "and otherwise in like manner, to all intents and purposes, as if such trusts and provisions were there fully repeated." Held, that this included the gift over to *C.*, and that on the death of *B.* without children, *C.* was entitled to the second sum of 2,000*l.* *Re Shirley's Trusts.* Page 394

*See HEIRLOOMS.*

## REMOTENESS.

## REFORMING DEED.

If a voluntary deed fail to carry into effect the intentions of the parties, it cannot be reformed, except with the consent of the donor. *Phillipson v. Kerry.* 628

*See MISTAKE.*

## REGISTRY OF DESIGN.

1. By the Copyright of Design Act (5 & 6 Vict. c. 100, s. 4), no person is to have the benefit of

the act, unless every article has attached thereto the letters "Rd." A bill to prevent an infringement did not allege that this had been done. Held, that the bill was not, on that ground alone, open to a demurrer. *Sarazin v. Hamel.* (No. 1.) Page 145

2. The copyright of a registered design is lost, if the proprietor (English or foreign) sell the registered article abroad without the letters "Rd" being attached thereto, as required by the 5 & 6 Vict. c. 100, s. 4. *Sarazin v. Hamel.* (No. 2.) 151

*See COPYRIGHT OF DESIGN.*

## REMOTENESS.

A testator devised real estates to trustees, to the use of *A.* for life, with remainder to his first and other sons successively in tail, with remainder to *B.* for life, with remainder to his first and other sons in tail, &c. And he bequeathed his personal estate to the same trusts, estates, &c., "or as near thereto as the rules of law and equity would admit." Provided nevertheless, that the personal estate should not "vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years." Held, by the Master of the Rolls, that the gift of the personality was too remote; but the Lord Chancellor held, that the proviso only applied to tenants in tail taking by purchase. *Gosling v. Gosling.* 58

**TRUSTEE—*continued.******See CHARITY, 2, 3.******COSTS, 5.******LAPSE OF TIME.******NEW TRUSTEE.******PAYMENT INTO COURT, 2, 3.******SETTLEMENT, 1.*****TRUSTEE ACT.**

By an order made under the Trustee Act real estate was inadvertently vested in an alien. The Court declined varying the order, by inserting the name of a natural-born subject, without the consent of the Crown; but the order was made upon a re-hearing. *Re Giraud.*

Page 385

***See TRUSTEE, 4.*****TRUSTEE AND CESTUI QUE TRUST.**

A trustee has a primary charge (in priority of the general creditors) to be recouped out of the life estate of a deceased tenant for life, the amount of trust moneys wrongfully received by him and for the costs of suit. *Williams v. Allen.* (No. 2.)

650

***See COSTS, 4.*****TRUSTEE RELIEF ACT.**

1. Trustees who had, without sufficient reason, paid a trust fund into Court under the Trustee Relief Act, were ordered to pay the costs of a petition for its payment to the party entitled. *Foligno's Mortgage.*

131

2. *A.* and *B.*, being each entitled to one-fifth of a reversionary fund,

mortgaged their shares with a power of sale. *B.* was a mere surety for *A.*, and *A.* afterwards assigned his share to *B.* for his indemnity, with a power to sell and to give receipts for the share and the produce of the sale. The mortgagees sold the reversionary interest, and refused to pay the surplus to *B.* without the concurrence and release of *A.*, and they paid the fund into Court under the Trustee Relief Act. Held, that this was improper, and they were ordered to pay the costs of a petition to get the money out of Court. *Foligno's Mortgage.*

Page 131

3. Trustees who, after accepting the trust, had paid the trust fund into Court without sufficient reason, refused their costs of an application to pay the income to the tenant for life. *Re Leake's Trusts.* 135

4. A fund was held in trust for *A.*, an unmarried lady, for life, but to cease if "by any means whatever" it should vest or become payable to any other person. *A.* afterwards married, and her life interest was settled to her separate use, without power of anticipation, by a settlement to which the trustees purported to be parties, but to which they never assented. The trustees thereupon paid the trust fund into Court under the Trustee Relief Act. Held, that as the trusts which they had accepted had not been varied either by the marriage or the settlement, they were not justified in paying the

money into Court, and they were refused their costs of appearing on a petition for payment of the income to the tenant for life. *Re Leake's Trusts.* Page 135

### TRUST FOR SALE.

Properties held by several trustees under several trusts and for different persons were sold together, in one lot, for one undivided sum and with special conditions, as to part, limiting the title. Held, that the purchaser could not resist the specific performance of the contract on the ground of the mode in which the trust property had been sold. Held, also, that the Court, if necessary, would apportion the purchase-money. *Rede v. Oakes.* 555

### UNCERTAINTY.

*See MARRIAGE CONTRACT.*

### VENDOR AND PURCHASER.

A. agreed to sell to B. a piece of land. A. was to make a new road, of which B. was to have the use, and B. was to expend 3,000*l.* in building a house on the property. The contract was to be completed on the 1st of August, interest was payable if not completed on that day, and time was declared to be of the essence of the contract as regarded the making of objections to the title. The contract not

having been completed, the vendor on the 4th of August, gave notice that he rescinded the contract unless completed within a month. At this time there only remained two substantial requisitions, and which the vendors were taking steps to comply with. Held, first, that time was not of the essence of the contract; secondly, that the notice was not reasonable; and thirdly, that there was nothing in the nature of the contract which prevented its being specifically performed. *Wells v. Maxwell.* (No. 1.)

Page 408

*See CONDITIONS OF SALE.*

INTEREST, 4.

LIS PENDENS.

REVERSION.

SPECIFIC PERFORMANCE, 1, 2,  
3, 4.

TRUST FOR SALE.

### VICAR.

*See SEQUESTRATION.*

### VOLUNTARY DEED.

1. A voluntary deed, though retained by the grantor until his death, held valid. *Bonfield v. Hassell.* 217
  2. Voluntary deed set aside after the deaths both of donor and donee. *Phillipson v. Kerry.* 628
- See REFORMING DEED, 1.*

### VOLUNTARY SETTLEMENT.

1. B. executed a voluntary settlement of real estate to uses in favor of his four children, and he covenanted that the estate should remain to those uses and for

quiet enjoyment. *A. B.* afterwards mortgaged the settled estate with his own unsettled estates, and died. Held, that the children were entitled to throw the mortgages on the unsettled estate, and as against legatees, to prove under the covenants against the settlor's assets for the damage they had sustained by the mortgage. *Hales v. Cox.* Page 118

*See VOLUNTARY DEED.*

### WASTE.

After a long delay in taking proceedings against a tenant for life in respect of waste, the Court endeavours to deal liberally towards him. *Bagot v. Bagot.* *Legge v. Legge.* 509  
*See INTEREST,* 5.

*TENANT FOR LIFE AND RE-MAINDERMAN,* 3, 4.

### WILL.

*See ABSOLUTE INTEREST.*

*ADEMPTION.*

*"AND" READ "OR."*

*ANNUITY.*

*BEQUEST.*

*CONVERSION.*

*Demonstrative Legacy.*

*Description of Legatee.*

*Devise.*

*Discretionary Power.*

*Discretionary Trust.*

*Farming Stock.*

*Heirlooms.*

*"Issue" construed*

*"Children."*

**WILL—continued.**

*See JOINT TENANCY,* 2.

*LEGATEE.*

*OFFSPRING.*

*PER STIRPES.*

*POWER,* 1, 3.

*Precatory Trust.*

*Remoteness.*

*Repugnancy.*

*Residue.*

*Substitution.*

*Substitutional Legacy.*

*"Survivors" construed  
"Others."*

*Survivorship.*

*Tenant for Life.*

*Wine.*

### WILLS ACT.

*See Power,* 1, 3.

### WINDING-UP.

1. A provident society, registered under the Act of 1852, is to be wound up in the County Court. *Re The Rotherhithe, &c. Industrial Society.* Page 57
2. The four days, within which the affidavit in support of a petition to wind up must be sworn and filed, extended by the Court. *Re The Patent Screwed Boot and Shoe Company.* 142
3. The Court will not, upon the hearing of a petition to wind up a company, enter into a contest as to the person to be appointed Official Liquidator, and it will not appoint one, on that occasion, unless with the concurrence of all parties. *Re The Commercial Discount Company (Limited).* 198

4. Prior to "The Companies Act, 1862" (25 & 26 Vict. c. 89), a limited company, which was liable to be wound up in the Bankruptcy Court, passed a resolution for winding up voluntarily; but after the Companies Act, 1862, had come into operation, a petition was presented for winding it up compulsorily. Held, that, under the 25 & 26 Vict. c. 89, s. 207, the jurisdiction was in Bankruptcy, and not in Chancery. *In re The West Silver Bank Mining Company (Limited).* Page 226
5. In 1848, *A.* transferred some shares in a company to *B.* In 1851 the company was ordered to be wound up. The Court refused, in 1863, to allow the official manager to contest the validity of the transaction, until he had laid a sufficient ground for it, by stating to the Court what information he had received on the subject, and when he first obtained it. *Re Cameron Coalbrook Company. Hunt's Case.* 387
6. Where the proceedings in a voluntary winding up, under the Act of 1856, were dilatory and unsatisfactory, and had not come to a conclusion at the end of five years, the Court, upon the petition of a shareholder, directed a winding up under the Court. *Re The Fire Annihilator Company.* Page 561
7. A company, registered under the Act of 1856 (18 & 19 Vict. c. 47), but not under the Act of 1862 (25 & 26 Vict. c. 89), may be wound up voluntarily by a resolution passed after the latter act came into operation. *Re The Torquay Bath Company.* 581

## WINE.

A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, &c., and everything he died possessed of, to his wife for life, and he bequeathed the whole of his effects that might be remaining after her death to his daughter. Held, that the wife took absolutely the wine which the testator had for his private use, but a life interest only in the rest. *Phillips v. Beal. (No. 1.)* *et c.*

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